United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

Docket No

74-1527

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

FRANCIS C. PLANO,

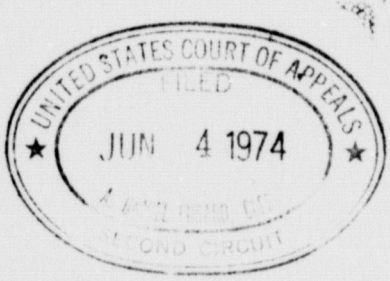
Appellant,

-against-

CLIFFORD W. BAKER, Individually and as Supervising Principal of the Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

Appellees.

No. 74-1527



BRIEF OF APPELLANT
FRANCIS C. PLANO

Bernard F. Ashe
Attorney for Appellant
80 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

James R. Sandner
Ivor R. Moskowitz
Of Counsel

ORIGINAL

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES

AUTHORITIES CITED

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

FRANCIS C. PLANO,

Appellant,

-against-

CLIFFORD W. BAKER, Individually and as Supervising Principal of the Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York,

No. 74-1527

Appellees.

BRIEF OF APPELLANT FRANCIS C. PLANO

STATEMENT OF ISSUES

1. Did the District Court err in dismissing the instant action for failure of appellant to exhaust administrative remedies?
2. Did the District Court err in dismissing appellant's request for injunctive relief without hearing testimony or taking evidence on the motion?

STATEMENT OF THE CASE

This case is before the Court upon the appeal of Francis C. Plano from the Memorandum Decision and Order of Chief Judge James T. Foley, of the United States District Court for the Northern District of New York, dated February 15, 1974 (page 291a of the Appendix, hereinafter 291a), and from the order of Chief Judge Foley, dated March 18, 1974, denying appellant Plano's Motion for Reconsideration and Amendment of Decision, Order and Judgment (340a).

This action was commenced on December 21, 1973 by the filing of a complaint (3a). Summonses were served on December 27, 1973 on all appellees.

The complaint, basing federal jurisdiction on 28 U.S.C. §1331, 28 U.S.C. §1343(3), and 42 U.S.C. §1983, alleged a deprivation of liberty and property under color of state law (3a) in violation of the First and Fourteenth Amendments to the United States Constitution (11a), for the exercise of appellant Plano's right of free speech.

In the instant action, appellant Plano seeks reinstatement of employment with full back salary, benefits and privileges appurtenant thereto; an award granting appellant damages as may be established upon a hearing; and costs and attorneys' fees herein.

Until the termination complained of herein, appellant Francis C. Plano was a provisionally certified English teacher employed by appellee Board of Education of the Westmoreland Central School District (hereafter referred to as "the Board"). Pursuant to New York Education Law §3013, Plano was appointed to a five year probationary term by action of a majority of appellee Board, upon the recommendation of appellee District Superintendent F. Wright Johnson, effective July 1, 1972 (15a).

Appellant taught in appellee Board's school district from September 1972 to December, 1973. On September 24, 1973 appellant submitted a lesson plan to his building principal detailing the teaching of an English composition through the use of a homework assignment, to be given his eleventh and twelfth grade students on September 25, 1973, on the topic of student attitudes toward pre-marital sex (5a, 15a).

On September 26, 1973, Plano's building principal told him that the aforesaid assignment represented poor judgment on appellant's part (5a). Later that same day Plano was called before appellee Supervising Principal Baker, who told Plano that he was "...through here. I'm asking the Board to fire you Tuesday." (6a). When asked by appellant if appellee Baker considered the grounds for dismissal to be appellant's assignment on student attitudes toward pre-marital sex, Baker replied in the affirmative (6a).

By a request dated September 27, 1973, appellee Board, through its Clerk (appellee Melie), asked appellee District Superintendent Johnson to terminate appellant Plano; co-signing this request was appellee Supervising Principal Baker. In their Answer (46a), appellees, as individuals, but excluding F. Wright Johnson, admit that the request was made and that appellee Baker signed it; this same admission is made by appellees in their official capacity (50a), save for appellee Johnson (who submitted an Answer, 55a, hereinafter referred to as Johnson's Answer).

On October 2, 1973, appellee District Superintendent Johnson recommended Plano's probationary appointment be terminated (18a), and by notice dated October 3, 1973, Plano was so notified by appellee Clerk of the Board Melie (19a).

Appellant Plano, by letter dated October 9, 1973 (20a), requested

appellee Melie for the reasons for Johnson's recommendation of termination. Baker and Johnson replied by letter dated October 16, 1973 (21a), setting forth only three reasons for their recommendation for termination. This reply letter was sent by appellees in their respective capacities as admitted in their Answers (46a, 50a).

By letter dated October 24, 1973, appellee Plano notified appellee Clerk Melie, and appellee Board members, that:

> "Due to the vagueness and the seriousness of the charges given, it seems clear that they have a bearing not only on my position at Westmoreland, but on my future employment as well." (22a)

The letter requested an opportunity to address the Board; appellant, however, was neither given an opportunity to address it, nor was Plano provided a hearing prior or subsequent to his dismissal. Appellees, as individuals, except for appellee Johnson, admitted that Plano asked for an opportunity to address appellee Board, but deny that they failed to permit appellant Plano any manner or kind of hearing prior to termination (212a). Appellees, with the exception of Johnson, admit in their official capacity to receiving Plano's letter of October 24, 1973; they deny not permitting Plano to address appellee Board, and not giving him any manner or kind of hearing prior to or subsequent to his dismissal (52a).

No other or further effort was made by the Board, either individually or in concert, to provide Plano with a hearing to clarify, amplify or explain their reasons for terminating him.

Plano, by open letter dated November 1, 1973, attempted to address appellee Board (23a). The Board, however, had already met in executive session on October 30, 1973 to discuss Plano's status (33a) (admitted by all

appellees, save Johnson). Plano contends that at that meeting appellee Board discussed his moral character and a rumor alleging that Plano had been dating a ninth grade girl.

At a meeting of the Board on November 2, 1973, appellant Plano was voted terminated effective December 7, 1973 (30a). This is admitted by all appellees.

By open letter dated November 2, 1973, appellee Board member Howard Walker expressed the view that the Board's actions had jeopardized appellant's career and denied Plano freedom of speech (31a). All appellees (save Johnson, who denies knowledge or information) deny the existence of the open letter and its import (47a, 52a).

On or about December 11, 1973, the Board issued a public statement regarding appellant (32a). All appellees, save Johnson, who denies knowledge or information, admit that this public statement was issued (47a, 51a). The public statement recited that the Board had considered a "formal complaint" (32a) and "several other incidents" (32a) (emphasis supplied) concerning appellant Plano in determining to terminate him. Appellees, save for Johnson, who denies knowledge or information, deny that they made a formal statement or considered a "formal complaint" and "several other incidents", although they admit issuing the statement (47a, 52a).

In the "1972-74 Agreement between Supervising Principal and Westmoreland Central School Teachers Association," there exists an article entitled "Article 30", which embodies the acceptance of the parties of a contract clause entitled "Academic Freedom" (Complaint Exhibit "N", 35a). Since Plano is employed by appellee Board's school district, he too is covered by this article. This is admitted in the Answer (Answer #7) of the appellees acting in their official capacity (51a), and denied by them in their individual

capacities (Individual's Answer, #8, at 47a). Appellee Johnson denies appellant Plano's allegation concerning the existence and import of Article 30 of the collective agreement (Johnson's Answer, #4, at 56a).

Appellant brought on a motion for a temporary restraining order and a preliminary injunction before the United States District Court for the Northern District of New York, Judge James T. Foley, presiding, on January 21, 1974 (36a-37a). By Memorandum-Decision and Order, dated February 15, 1974, Judge Foley granted appellees' motions for dismissal of appellant's complaint, and denied and dismissed appellant Plano's motion for a temporary restraining order and preliminary injunction (291a).

On February 28, 1974, appellant filed a motion for reconsideration and amendment of the decision, order and judgment of February 15, 1974, noticed to be heard on March 18, 1974. This motion was denied by Chief Judge Foley by order dated March 18, 1974 (340a).

It is from the decision, order and judgment of February 15, 1974, denying appellant's motion for a temporary restraining order and preliminary injunction and dismissing appellant's complaint; and the order of March 18, 1974 denying appellant's motion for reconsideration and amendment from which appellant Plano appeals (341a).

POINT I

APPELLANT'S COMPLAINT PROPERLY STATED FEDERAL JURISDICTION OVER THE PARTIES.

This action is commenced pursuant to 28 U.S.C. §1331, 28 U.S.C. §1343(3), and 42 U.S.C. §1983.

Appellant Plano alleges jurisdiction over the parties under 28 U.S.C. §1331, in that his damages exceed the sum of $10,000 exclusive of interest and costs, and arise under the First and Fourteenth Amendments to the United States Constitution. Appellant has been deprived of his wages and will continue to suffer loss of salary until the conclusion of this action. This amount will exceed $10,000. See White v. Bloomberg, 345 F. Supp. 133, 141 (D. Md., 1972); Friedman v. International Association of Machinists, 220 F. 2d 808, 810 (D.C. Cir., 1955); Nord v. Griffin, 86 F. 2d 481, 482-482 (7th Cir., 1936), cert. denied, 300 U.S. 673 (1937). In addition, potential attorneys' fees may exceed $10,000. Attorney's fees are recoverable in Fourteenth Amendment cases. Hall v. Cole, 412 U.S. 1, 41 L.W. 4658 (1973). Damage to appellant's reputation also exceeds $10,000. It is well settled that unless it is apparent to a legal certainty from the complaint that appellant could not recover $10,000, federal jurisdiction will rest. Bell v. Preferred Life Assurance Society, 320 U.S. 238 (1943). In the instant case, Plano's complaint alleges damages and requests equitable relief in an amount which exceeds the $10,000 jurisdictional limitation.

Appellant alleges jurisdiction over the parties under 42 U.S.C. §1983 and 28 U.S.C. §1343(3). The appellees, acting under color of state law, deprived appellant Plano of his rights to due process of law under the Fourteenth Amendment and to freedom of speech under the First Amendment to

the United States Constitution. 42 U.S.C. §1983 makes this a valid civil action, redressable in the federal courts under 28 U.S.C. §1343(3).

Appellees are persons within the meaning of 42 U.S.C. §1983. Although Supreme Court decisions have held that municipalities are not persons who can be sued for damages under 42 U.S.C. §1983, they have not foreclosed suits for damages and equitable relief against school boards, public officials, or school administrators. The Supreme Court has granted equitable relief where federal jurisdiction was claimed under 42 U.S.C. §1983 and 28 U.S.C. §1343 in the lower court. Raney v. Board of Education of Gould School District, 391 U.S. 443 (1968) (lower court decision cited, 381 F. 2d 252 (8th Cir., 1967)). See also Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); Cleveland Board of Education v. LaFleur and Cohen v. Chesterfield County School Board, ____ U.S. ____, 42 L. W. 4186 (January 21, 1974). Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

Under 42 U.S.C. §1983, public officials may also be sued in their official and individual capacities. Harper v. Kloster, 486 F. 2d 1134, 6 F.E.P. cases 880, 883 (4th Cir., 1973), wherein defendants included members of the Board of Fire Commissioners and the Civil Service Commission of the City of Baltimore. See also Lopez v. Williams, C.A. 71-67 (S.D., Ohio, 1973) (three-judge court), slip op. at pp. 24-28; Harkless v. Sweeney Independent School District, 427 F. 2d 319, 320 (5th Cir., 1970), cert. den. 400 U.S. 991 (1971). It is clear that requiring individuals, not in their official capacity, to give equitable relief, is futile; therefore, courts have generally held public officials to be persons under §1983. The Supreme Court has also granted relief against public officials in Vlandis v. Kline, 412 U.S. 441, 41 L.W. 4796 (1973); Keyes v. School District No. 1,

Denver, Colorado, 413 U.S. 921, 41 L.W. 5002 (1973, decided ten days after City of Kenosha). Therefore, pursuant to 28 U.S.C. §1331, §1343(3), and 42 U.S.C. §1983, appellant's complaint properly asserted jurisdiction over the party defendants.

POINT II

APPELLANT HAS STANDING TO SUE IN THIS PROCEEDING.

The United States Supreme Court, In Flast v. Cohen, 392 U.S. 83, 99 (1968) set forth a succinct definition of standing in these terms.

> "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr, 369 U.S. 186, 204 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue..."

Appellant Plano alleges a personal stake in the outcome of the controversy which exists in the instant case. He claims that "under color of state law," and through the action of the appellees, acting individually and in concert, his constitutional rights guaranteed under the Fourteenth Amendment and the First Amendment, are being violated. Plano seeks an adjudication of concrete issues, which concern the abridgment of property and liberty rights by governmental agents acting in an arbitrary and capricious manner "under color of state law."

Plano has already been improperly and unlawfully discharged from his teaching duties by appellees. His future livelihood is being threatened by the stigma of a mid-year dismissal. His right to freedom of speech, guaranteed by the First Amendment, has been abridged.

It is submitted that the actions of appellees, both individually and in concert, directly affect Plano's protected interests and show a

sufficient "personal stake in the outcome" of this action to justify standing.

Plano is a probationary teacher appointed for a five year term and thus has a "property" right to his job. In addition, the collective bargaining agreement under which he is employed details a contractual right to assert and maintain Plano's right to academic freedom (35a), certainly a recognizable property right. Plano also has a "liberty" interest in the pursuit of his occupation and in the very nature of his professional and community status. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

In a discussion of standing in Moore's Federal Practice, §57.11, at pages 57-91, Professor Moore quotes Justice Felix Frankfurter in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951), wherein the Justice sought to define standing as follows:

> "To require a court to intervene in the absence of a statute, however, either on constitutional grounds or in the exercise of inherent equitable powers, something more than adverse personal interest is needed. This additional element is usually defined in terms which assume the answer. It is said that the injury must be 'a wrong which directly results in the violation of a legal right' [citation]. Or that the controversy 'must be definite and concrete, touching the legal relations of parties having adverse legal interests.' [citation]. These terms have meaning only when contained by the facts to which they have been applied. In seeking to determine whether in the case before us the standards they reflect are met, therefore, we must go to the decisions. They show that the existence of 'legal' injury has turned on the answer to one or more of these questions: (a) Will the action challenged at any time substantially affect the 'legal' interests of any person? (b) Does the action challenged affect the petitioner with sufficient 'directness'? (c) Is the action challenged sufficiently 'final'?"

Applying the principles set forth in Joint Anti-Fascist Refugee Committee v. McGrath, supra, appellant Plano has standing. First, it is clear that the actions challenged, that of his dismissal and subsequent stigmatization, substantially affect his legal interests. Second, termination of employment affects Plano directly, since by its operation he is presently unemployed. Last, the actions are sufficiently final, because the appellees will not rehire, reimburse or clear Plano's record unless ordered to do so by this Court.

In Flast v. Cohen, supra, a taxpayer sought to review a federal statute on the grounds that it violated the establishment and free exercise clauses of the First Amendment. Although his only nexus was that of paying a minute amount of taxes into the treasury of the United States, the United States Supreme Court found that he had standing. How much more direct is the tie between Plano and the actions of appellees in abridging and affecting his lawful right to continued employment and to his good reputation. Appellees have substantially affected Plano's civil rights by terminating his employment and subjecting his good name and reputation to an unwarranted stigma. It would be a very shallow interpretation of the concept of standing to determine that appellant is not entitled to his day in court.

The amount of damages to appellant Plano from the actions of appellees, acting individually and in concert, is substantially in excess of $10,000. In addition to back salary and benefits from the date of Plano's illegal termination must be added damages accrued as a result of denial of freedom of speech, damage to community, personal and professional reputation caused by the stigma of mid-year termination and allegations of immoral conduct regarding a ninth grade female pupil.

Since Plano's constitutional rights have been abridged, he has standing to sue in the federal district court.

It is noteworthy that the District Court, while dismissing the instant case for failure to exhaust administrative remedies had no doubt of the legitimacy of the constitutional issues raised herein. Judge Foley noted in regard to appellees' motion to dismiss the instant complaint, "...there are in my opinion, sufficient allegations in the complaint to overcome such a motion." (299a) Judge Foley continued:

> "In a civil rights complaint, not only must the allegations be taken as true in terms of a motion to dismiss but they must be afforded special consideration because of the importance of these principles in our democracy. Holmes v. New York City Housing Authority, 398 F. 2d 262, 265 (2d Cir. 1968)." (299a)

In addition Judge Foley noted:

> "The complaint seems to adequately state two well recognized areas protected by the Bill of Rights." (299a)

Also:

> "In the light of these cases, it would be exceedingly difficult to characterize the complaint as frivolous." (300a)

Judge Foley, in his opinion, made clear that he would have entertained appellant's suit but for this Court's decisions regarding the exhaustion requirement. See Blanton v. State University of New York, 489 F. 2d 377 (2d Cir., 1973).

POINT III

IN THE INSTANT CASE, APPELLANT IS NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES BEFORE PURSUING RELIEF IN THE FEDERAL COURTS UNDER THE CIVIL RIGHTS ACT.

A. Exhaustion of remedies not required in cases arising under the Civil Rights Act of 1871.

Exhaustion of state judicial or administrative remedies does not have to be satisfied, in this case, because original jurisdiction in this matter is found under 28 U.S.C. §1343(3) and 42 U.S.C. §1983. McNeese v. Board of Education, 373 U.S. 668 (1963); Damico v. California, 389 U.S. 416 (1967); Gibson v. Berryhill, 411 U.S. 564 (1973); Preiser v. Rodrigues, 411 U.S. 575 (1973); James v. Board of Education, 461 F. 2d 566 (2d Cir., 1972); Russo v. Central School District #1, 469 F. 2d 623 (2d Cir., 1972). See also Steffel v. Thompson, et al., ___ U.S. ___, 39 L. Ed. 2d 505 (March 19, 1974) wherein the Supreme Court stated at page 522:

> "When federal claims are premised on 42 U.S.C. §1983 and 28 U.S.C. §1343(3)--as they are here--we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights. See, e.g., McNeese v. Board of Education, 373 U.S. 668 (1963), Monroe v. Pape, 365 U.S. 167 (1961)." [Emphasis added.]

Additionally, in Alexander v. Gardner-Denver Co., ___ U.S. ___, 7 FEP Cases 81, 85 (February 19, 1974), the Supreme Court noted the primary and overriding importance of consideration of statutory rights of the nature involved here.

In McNeese, supra, a suit invoking federal jurisdiction under the Civil Rights Act, and specifically 42 U.S.C. §1983, the district court had dismissed for failure to exhaust administrative remedies. The Court of Appeals

affirmed. The Supreme Court reversed, stating at page 671:

> "We have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy. We stated in Monroe v. Pape, 365 U.S. 167:
>
> > 'It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.'"

In the instant case, appellant Plano states a cause for relief under 28 U.S.C. §§1331, 1343(3), and 42 U.S.C. §1983, and thus the federal courts have jurisdiction.

The ruling requiring exhaustion of administrative remedies has been followed by the Second Circuit Court of Appeals in cases based on violations of 42 U.S.C. §1983, as stated in the case of Eisen v. Eastman, 421 F. 2d 560 (2d Cir., 1969), cert. den'd. 400 U.S. 841 (1970). Appellant maintains that this rule has been overruled in Carter v. Stanton, 405 U.S. 669 (1972), Wilwording v. Swenson, 404 U.S. 249 (1971), and in Steffel, supra. Its validity was also questioned in Lynch v. H.F.C., 405 U.S. 538 (1972).

With respect to utilization of the administrative remedy of an appeal to the Commissioner, or resort to a judicial remedy, the choice under New York law is that of the plaintiff. An appeal to the Commissioner has not been deemed a condition precedent to resort to the courts of New York where private rights are involved. Lezette v. Board of Education, ___ App. Div. 2d ___, 350 N.Y.S. 2d 26, 27 (3rd Dept., 1973).

In Russo v. Central School District #1, supra, the Second Circuit noted that exhaustion of state judicial remedies is not a predicate to a federal court's jurisdiction in a §1983 claim [citing Monroe v. Pape, 365 U.S. 167

(1961); Soetre v. McGinnis, 442 F. 2d 178 (2d Cir., 1971) (en banc), cert. den., 404 U.S. 1049 (1972)].

In Damico v. California, supra, a suit brought under the Civil Rights Act (28 U.S.C. §1343 and 42 U.S.C. §1983), a three-judge federal court dismissed a suit for failure to exhaust adequate procedural remedies provided under state law. The Supreme Court, in a per curiam decision quoted McNeese v. Board of Education, supra, noting at page 417, "one of the purposes underlining the Civil Rights Act was 'to provide a remedy in the federal courts supplementary to any remedy any State might have.'"

However, even presuming the vitality of the exhaustion rule in the Second Circuit (see, e.g., this Court's decision in Blanton v. State University of New York, 489 F. 2d 377 (1973)), the Court has held that it would not apply the "exhaustion doctrine" in a wooden manner. (See Eisen v. Eastman, 421 F. 2d 567-69).

B. Appellant Plano's contractual remedies were inadequate.

In the case at bar, appellant had recourse to two possible administrative remedies. The first was a recourse to the grievance machinery embodied in the collective bargaining agreement between the Westmoreland Teachers Association and appellee Board of Education. The second administrative remedy which could have been pursued was an appeal to the Commissioner of Education from the actions of defendants. It is submitted that both administrative remedies were inadequate because they failed to give the relief requested and required in the instant case: the administrative forums were not those which could adequately and completely review the allegations of violation of federal statutory rights and make findings of fact thereon; and resolution of

constitutional allegations, findings of damages and jurisdiction over all defendants was peculiarly within the ambit of the Federal district courts. See, e.g., Gibson v. Berryhill, 411 U.S. 564 (1973).

By recourse to the grievance procedure embodied in the collective bargaining agreement, Plano cannot secure the relief requested from the federal district courts, i.e., relief for deprivation of constitutionally protected personal liberty and property rights. There is a distinct difference between relief based on contractual grounds pursued through a contractual grievance procedural and relief based on constitutional or statutory grounds pursued through a court proceeding. Both remedies may be pursued at the same time without any inconsistency. See, e.g., Dewey v. Reynolds Metals, 429 F. 2d 324 (6th Cir., 1970), 402 U.S. 689 (1971), aff'd by equally divided Court; and Board of Education, Huntington v. Associated Teachers of Huntington, 30 N.Y. 2d 122 (1972).

In Alexander v. Gardner-Denver Co., ___ U.S. ___, 7 F.E.P. Cases at page 86, wherein the Supreme Court found that where federal law created a statutory cause of action against discriminary employment practices, recourse to the grievance procedures embodies in a collective bargaining contract was not an election of remedies. Similarly, Congress created a statutory right to sue for relief under 42 U.S.C. 1983, and even presuming that a grievant files a claim with the Commissioner of Education, it does not constitute an election of remedies. In Alexander, the Supreme Court indicates that where Congress has given the right to sue under federal law, in a civil rights action, exhaustion of remedies is unnecessary.

In the case at bar, the grievance has been rejected by the Board of Education. Even if favorable to Plano, the grievance procedure could at best only order him reinstated to his teaching position with

back pay1/; it is effective only against the signatories of the contract and cannot give the complete relief requested by appellant to include an award of damages against all appellees and affirmative injunctive relief against further deprivations of constitutional rights based on the constitutional allegations of the Complaint.

In addition to being inadequate to grant the remedies sought in the instant case by Plano, the grievance procedures, found in Article 18 of the "Agreement between Supervising Principal and Westmoreland Central School Teachers Association" (Appendix "B", attached hereto and made part hereof), do not permit appellant resort to arbitration as a final means of dispute determination, without the concurrence of his bargaining representative, the Westmoreland Central School Teachers Association (Art. 18, ¶6). Indeed, after exhausting steps 1-5 of the grievance procedure, all further relief depends on the concurrence of the union.

In the collective agreement referred to above, election of arbitration is binding upon all parties, and the decision of the arbitrator is final. Election of arbitration, according to contract Art. 18, ¶14 (Appendix "B"), constitutes a waiver of any rights possessed either by a grievant or the Association to bring a civil action in a state court or appeal to the Commissioner of Education.

New York has recognized that contractual provisions agreed to by a union

---

1/ How effective or probable such a remedy may be in this case is questionable in light of Legislative Conference v. Board of Higher Education, 31 N.Y. 2d 926 (1972) and Board of Education of the Enlarged City School District of City of Auburn v. Auburn Teachers Association (attached as Appendix "A" hereto).

and an employer regarding the contract rights of employees, which may also be statutorily protected, do not foreclose suit on those rights by the employee, acting on his own behalf. See Union Free School District No. 6, et al. v. New York State Div. of Human Rights, et al., ____ App. Div. 2d____, 349 N.Y.S. 2d 757 (2d Dept., 1973). In addition, a teacher may commence an action challenging a termination, while his union seeks to uphold the contract provisions involved in the termination in another forum. See Board of Education of Syracuse School District v. State Division of Human Rights, 38 App. Div. 2d 245, 328 N.Y.S. 2d 732 (4th Dept., 1972), aff'd. 33 N.Y. 2d 946, 353 N.Y.S. 2d 730 (1974); City School District of Poughkeepsie v. Poughkeepsie Teachers Assoc., 42 App. Div. 2d 704, 345 N.Y.S. 2d 599 (2d Dept., 1973). See also Airline Stewards, et al. v. American Airlines, et al., 490 F. 2d 636 (7th Cir., December 21, 1973), wherein the Seventh Circuit Court of Appeals found that an individual member of a labor union could pursue a remedy under Title VII of the Civil Rights Act of 1964 independent of the union. At page 641, the Court noted:

> "Title VII, unlike the National Labor Relations Act and Railway Labor Act, does not create nor necessarily recognize powers of exclusive representation, either for those currently employed in the unit nor for a group which would include those claiming to have been unlawfully discharged. The situation is not parallel, and it does not seem to us that policy reasons militate in favor of similar status for the bargaining representative. An individual who claims to have been the victim of unlawful discrimination has the right to redress individually, whether the discrimination was an isolated act or a general practice."

In accord, Alexander v. Gardner-Denver Co., supra; Cleveland Board of Education v. LaFleur, supra; Cohen v. Chesterfield County School Board of Education,

supra; Green v. Waterford Board of Education, 473 F. 2d 629 (2d Cir., 1973). Additionally, under Eisen exhaustion of contract grievance procedures has never been required in civil rights suits.

C. Appellant Plano's administrative remedies before the Commissioner of Education are inadequate.

An appeal to the Commissioner of Education regarding the actions of defendants would be futile. An appeal to the Commissioner is not one which lends itself to the resolution of factual issues. In James v. Board of Education, 461 F. 2d 566 (2d Cir., 1972), the Court found:

> "The 'hearing' before the Commissioner, as we were informed at the argument of this appeal, was no more than an informal roundtable discussion between the Commissioner, the parties and their attorneys. No transcript of the proceedings was made."

It is maintained that this type of hearing is insufficient and inadequate to make determinations of facts, to provide appellant with an adequate forum for eliciting testimony and proof of his allegations. Therefore, appellant submits, an appeal to the Commissioner of Education is a futile administrative remedy. Eisen v. Eastman, supra, does not require exhaustion of all administrative remedies prior to the institution of a federal suit, but merely requires exhaustion of administrative remedies adequate to remedy the wrong alleged.

Section 276.2(d) of the Rules and Regulations of the Commissioner of Education for appearances before him provides:

> "(b) All evidentiary materials shall be presented by affidavits or exhibits. No testimony is taken and no transcripts of oral argument will be made."

The Commissioner's regulations make no provision for examinations before trial, interrogatories, or other discovery and disclosure procedures

permitted by the liberal disclosure rules of the Federal Rules of Civil Procedure. It is submitted by appellant Plano that the allegations he has alleged, based on the exhibits and proofs he has provided, require this Court to make available a forum through which he can adequately pursue his action. It is clear that the Commissioner of Education provides an inadequate forum in which to evaluate and decide the factual and material allegations of appellant's complaint.

The District Court made numerous allusions to the complexity of the factual issues to be determined, as well as the substantial nature of the allegations contained in appellant Plano's complaint.

As the District Court noted at page 2 of its Memorandum-Decision and Order (292a):

> "...this controversy is in very large part a factual one."

It added at page 3 (293a):

> "As the cases cited in this decision will indicate, the facts of this case, unsettled as they are at this point, raise many issues of constitutional law.... A trial on these issues if held must carefully develop the facts because they are critical in striking the delicate balance between the school board's right to supervise its schools and the teacher's right to free speech, academic freedom and due process of law. Again, the facts of this case are quite unsettled in critical areas and their importance in resolving this dispute cannot be overemphasized."

Although the appellant raised the issue of procedural barriers to appeal before the Commissioner of Education in his reply brief before the District Court (pages 2-10), the matter was not explored in the memorandum decision and order of Judge Foley. The District Court never elucidated how the Commissioner could determine the complicated issues of fact presented herein,

when the rules and regulations of hearings before the Commissioner provide only for "informal roundtable" discussions between attorneys. No witnesses are called or examined, all evidence is by affidavits. The question of procedural barriers was raised again by appellant Plano in his motion for reconsideration and amendment (303a) and discussed at length. The District Court dismissed appellant's arguments from the bench (338a) after oral argument.

Even assuming that the matter of appellant's dismissal could be adequately presented at a hearing before the Commissioner of Education, the questions of conspiracy and damages would still remain unresolved. A determination of these issues is a material part of the relief appellant is requesting. The Commissioner of Education is not empowered to grant such relief or to make such findings of fact. The appellant would have to return to the federal courts to seek complete relief. It is submitted that questions of judicial economy and the avoidance of unnecessary delay would favor the resolution of this case in a federal forum.

There is an additional barrier to seeking administrative review of the instant matter. For this Court to review a determination of the Commissioner of Education, an appropriate record would be necessary, complete with findings of fact and law. See especially Kinsella v. Board of Education of Central School District No. 7, ___ F. Supp. ___ (Civil 1973-187, decided by a three-judge District Court, W.D.N.Y., February 19, 1974), a copy of which is attached as Appendix "C". A hearing before the Commissioner of Education is an "informal round-table discussion" without a record being made of the proceedings. The regulations of the Commissioner of Education provide that no transcript is to be made of the hearing, and no oral testimony taken. By what means, then, can the Commissioner of Education determine and resolve the

complicated issues of fact admitted by the District Court to be of the essence in the case at bar! Appellant submits that a hearing before the Commissioner is not designed to resolve a case such as this.

Assuming arguendo that the doctrine of exhaustion of administrative remedies embodied in the Second Circuit's decision in Eisen v. Eastman, 421 F. 2d 560 (2d Cir., 1969), is still valid, the Second Circuit has never required exhaustion of futile or inappropriate administrative remedies. This case requires judicial resolution. An administrative hearing before the Commissioner of Education would only delay the resolution of critical issues of fact and law, and could not resolve the issue of damages.

The cases are legion wherein the Commissioner and the New York Courts have held that probationary teachers can basically be discharged for any reason or no reason; McMaster v. Owens, 275 A.D. 506, 590, 90 N.Y.S. 2d 491 (1949); Graves v. Barber, 193 M. 326, 83 N.Y.S. 2d 520 (1948); Carter v. Kalamejski, 255 A.D. 694, 8 N.Y.S. 2d 926, aff'd 280 N.Y. 803, 21 N.E. 2d 692 (1939); Walcott v. Fisher, 274 A.D. 339, 83 N.Y.S. 2d 536, aff'd 299 N.Y. 688, 87 N.E. 2d 71 (1949); Hickey v. Carey, 275 A.D. 949, 89 N.Y.S. 2d 610 (1949); Board of Education, Central School District No. 1, Ellicottville v. Allen, 283 A.D. 376, 128 N.Y.S. 2d 155 (1954); Pinto v. Wynstra, 43 M. 2d 363, 250 N.Y.S. 2d 1012, 22 A.D. 2d 914, 255 N.Y.S. 2d 536 (1964); Matter of Coleman, 22 St. Dept. Rep. 322 (1920); Matter of McIntyre, 2 Ed. Dept. Rep. 197 (1962); Matter of Butler, 6 id. 71 (1966), aff'd 29 A.D. 2d 799, 287 N.Y.S. 2d 197 (1968); Matter of Nazzaro, 7 id. 31 (1967); Albaum v. Carey, 310 F. Supp. 594 (1969). Most recently, see Matter of Fitzgerald, Commissioner's Decision No. 8795, dated March 7, 1974, and attached hereto as Exhibit "D", wherein after the case was dismissed in open court by the District Court,

Northern District of New York, for failure to exhaust administrative remedies, the Commissioner of Education ruled that a regular substitute teacher could be discharged for exercising his privilege of freedom of speech in connection with a homework assignment involving sex education. The Commissioner ruled that a regular substitute teacher has no right to reasons. This Court has not required exhaustion where a previous administrative ruling forecloses the issue presented. Goetz v. Ansell, 477 F. 2d 636 (2d Cir., 1973). Such is the case at bar.

The futility of an appeal to the Commissioner of Education in a case such as this was well illustrated by the Commissioner's decision in James v. Central School District No. 1, 10 Ed. Dept. Rep. 58 (1970). In James, after paying lip service to the necessity for boards of education to exercise their broad powers over probationary teachers in a constitutional manner, the Commissioner upheld the denial of free speech to a teacher on grounds of "sound educational principles."

It is maintained that the failure of the Commissioner to place constitutional principles above local issues is a fatal barrier to a fair or effective administrative determination of the matter at bar.

Appellant Plano does not contest that the statutory procedures embodied in the New York Education Law have been followed by appellees. Therefore, an appeal to the Commissioner of Education is not designed to provide the relief appellant Plano requests. What Plano contends is that his constitutional rights have been violated by appellees. This is a matter for the Federal Courts under the Civil Rights Act, and not the Commissioner of Education. It is well known that the Commissioner of Education is not a forum for the adjudication of causes of action arising under federal law. He is primarily

empowered by the New York Education Law to consider appeals brought pursuant to New York law, and the Rules and Regulations of the Department of Education. Matters of federal law are peculiarly within the province of the federal courts. What is required in the instant case is a judicial determination of allegations which claim a denial of Federal rights. New York law also recognizes that the exhaustion of administrative remedies is inappropriate where resort to the courts is sought to vindicate private rights. Lezette v. Board of Education, supra.

An appeal to the Commissioner of Education is only reviewable by the state courts under extremely limited circumstances. Under §310 of the Education Law of the State of New York, a decision of the Commissioner of Education is reversible only if it is wholly arbitrary or contrary to the law. Since the Commissioner of Education does not permit the full disclosure of evidence that is available to the Federal courts, his decision may very well be final and unreviewable. Thus, an appeal to the Commissioner of Education would not only foreclose appellant Plano from obtaining additional evidence from appellees through disclosure and pre-trial examination, but would limit his right of review. Note, for example, Matter of Board of Education v. Allen, 6 N.Y. 2d 127, 136.

In Blanton v. State University of New York, 489 F. 2d 377 (2d Cir., 1973), this Court had occasion to reconsider the doctrines embodied in Eisen v. Eastman, supra. The Court noted at page 357:

> "Whatever fears may be entertained with respect to an exhaustion requirement in situations where plaintiff is already suffering an injury, there is no basis for these in the case like the present where the State affords the administrative remedy before any adverse action is taken."

The present case differs from that cited above, in that appellant is already suffering an injury, and was not afforded an administrative remedy before the adverse action. In the instant case, an appeal to appellee Board of Education proved futile. The Board of Education refused to grant appellant Plano a hearing prior to its adverse determination of his rights. The pre-judgment and bias of the Board in requesting the District Superintendent to recommend Plano's termination, even before it decided to consider plaintiff's termination, hopelessly biased any appeal to the Board to review its own action.

In Blanton v. State University of New York, supra, the Second Circuit stated that recent Supreme Court decisions did not foreclose the requirement of exhaustion of administrative remedies in Civil Rights actions. The Court noted that:

> "We distinguished four Supreme Court decisions...'as simply condemning a wooden application of the exhaustion doctrine in cases under the Civil Rights Act.'"

Thus, although the Second Circuit continues to rely on Eisen, supra, it will not apply the exhaustion requirement automatically. In Russo v. Central School District No. 1, 469 F. 2d 623 (2d Cir., 1972), the Court did not even consider the application of the exhaustion doctrine in a First Amendment case involving the salute of the flag. In Russo, supra, the plaintiff did not appeal to the Commissioner of Education, nor did she institute a grievance. Instead, she initiated an action in the federal district court. The Second Circuit, in reversing the district court's dismissal of the action, apparently considered the First Amendment argument as reason enough not to request exhaustion of administrative remedies. In Green v. Waterford Board of Education, 473 F. 2d 629 (2d Cir., 1972), the Court also made no reference to exhaustion of remedies in a case involving the Fourteenth Amendment. The teacher involved

had lodged a grievance, but there was no mention of a resort to arbitration or an administrative agency, even though the claim was rejected by the school district [facts more detailed in district court decision found at 349 F. Supp. 687 (D. Conn., 1972)]. It is submitted, by appellant Plano, that the instant case should be decided the same way.

An appeal to the Commissioner of Education will prevent Plano from eliciting the facts and testimony necessary to prove his case. In addition, review by the New York courts of a decision by the Commissioner of Education is very limited under §310 of the New York Education Law. If a Commissioner's decision has to be appealed to state courts, this Court in effect would be requiring appellant to exhaust judicial remedies as well as administrative remedies before entry into the Federal courts. Since the exhaustion of state judicial remedies prior to commencing an action in the federal courts is no longer accepted in civil rights actions, this would cause appellant grievous harm.

A further administrative barrier rendering an appeal to the Commissioner of Education futile is found in §275.16 of the Regulations of the Commissioner of Education.

> "An appeal to the Commissioner must be instituted within thirty days from the making of the decision or the performance of the act complained of. The Commissioner, in his sole discretion, may excuse the failure to commence an appeal within the time specified for good cause shown. The reasons for such failure shall be set forth in the petition." [Emphasis added.]

Since thirty days have elapsed since the effective date (December 7, 1973) of the decision of the Board of Education of the Westmoreland Central School District terminating appellant Plano, an appeal to the Commissioner of Education at this time would be futile. Under the rule of Eisen v. Eastman, supra,

where an appeal to an administrative body is futile, there is no requirement for exhaustion of administrative remedies. Since basic constitutional and federal statutory issues are being raised by appellant which go to the very essence of our constitutional framework, i.e., the right to pursue the occupation of one's own chosing without unconstitutional interference therewith, this case should be remanded to be heard by the District Court.

It is submitted by appellant that the distinction made by the District Court below between this case and Goetz v. Ansell, supra, is inaccurate. Where the facts of a situation are in conflict, and where the Commissioner of Education, by his own rules and regulations, provides an inadequate forum for the resolution of these conflicts, the necessity exists for a full scale trial. A hearing before the Commissioner of Education does not in any manner envisage the reduction of allegations to findings of fact possible only in the crucible of a trial on the issues.

The District Court noted, at page 7 of its Memorandum-Decision and Order (298a), that federal courts are handling the greatest number of civil rights cases in their history, and that there is a growing tendency to make a "federal case" out of questions that might be well settled at an administrative level. This is not the case here. As we have already noted, the District Court recognized that there are serious constitutional issues asserted in this case. Indeed, at page 8 (299a), the District Court stated:

> "The complaint seems to adequately assert two well recognized areas protected by the Bill of Rights."

The District Court also rejected appellees' motions for dismissing the complaint for failure to state a cause of action, stating at page 9 (299a),

> "In the light of these cases, it would be exceedingly difficult to characterize the complaint as frivolous."

Where the merits of the case, while undetermined, are clearly not frivolous, and present serious questions of law and fact to the court, this Court should remand this case to the District Court, for the lower court to hear evidence and argument. Where an administrative remedy is futile and time consuming, and where its procedural inadequacies would work an injustice upon the party aggrieved, under the rules of the Second Circuit as set forth in Eisen v. Eastman, supra, and in Blanton v. State University of New York, supra, the federal District Court should accept jurisdiction. For even as the District Court in the case at bar noted, Gibson v. Berryhill, 411 U.S. 564 (1973), requires an exception to the exhaustion rule where:

> "...plaintiff's complaint was that the state agency 'was unconstitutionally constituted and so did not provide them with an adequate remedy requiring exhaustion' and that 'the question of the adequacy of the administrative remedy, an issue which under federal law the District Court was required to decide, was for all practical purposes identical with the merits of appellees' lawsuit.'" at page 575.

Gibson, however, was not so oblique as the District Court suggested, for as the Supreme Court also stated at page 575:

> "But this court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. §1983." [Emphasis supplied.]

Since the District Court concedes that substantial and serious constitutional issues have been raised, under the Gibson decision, the instant case should not have been dismissed.

At page 5 of its decision (295a), the lower court argues that Christian v. New York State Dept. of Labor, __ U.S. __, 42 L.W. 4181 (Jan. 21, 1974) indicates that the Supreme Court "has provided a very recent allusion to the existence

of an administrative exhaustion requirement." Appellant submits that this is inaccurate. In Christian, the constitutional attack in part concerned the lack of an administrative remedy. The Court noted that there was no record that a hearing was ever requested or denied:

> "The absence of any indication in the record that this federal administrative procedure was followed is, in our view, a bar to our consideration of appellants attack upon the validity of the regulations." [at page 4183.]

Appellant herein is not challenging the administrative regulations of the Commissioner. He is challenging the constitutionality of his termination by appellees because he utilized his right to academic freedom, granted pursuant to a contract of employment, and his right to freedom of speech, granted and guaranteed by the First Amendment to the United States Constitution.

POINT IV

APPELLANT HAS A PROPERTY INTEREST IN PRESERVING HIS OCCUPATIONAL AND EMPLOYMENT STATUS AND CANNOT BE DENIED EITHER EMPLOYMENT OR THE RIGHT TO PRACTICE HIS OCCUPATION WITHOUT DUE PROCESS OF LAW.

A. Appellant's Expectation of Continued Employment.

That occupational and employment status are property interests, duly protected by the United States Constitution under the Fourteenth Amendment, has been recognized most recently in the cases of Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); and Alexander v. Gardner - Denver, supra. As the Supreme Court stated in Board of Regents v. Roth, supra, at page 576:

> "The Fourteenth Amendmant's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests - property interests - may take many forms."

In addition, the Court noted further at the same page:

> "Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, Slochower v. Board of Education, 350 U.S. 551, and college professors and staff members dismissed during the terms of their contracts, Wieman v. Updegraff, 344 U.S. 183, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle 'proscribing summary dismissal from public employment without hearing or inquiry required by due process' also applied to a teacher recently hired without tenure or a formal contract, but

> nonetheless with a clearly implied promise of continued employment. Connell v. Higginbotham, 403 U.S. 207, 208." [Emphasis supplied.]

In Perry v. Sindermann, supra, the Court made evident at page 601, its concern that "property" interests subject to procedural due process protection "are not limited by a few rigid, technical forms. Rather 'property' denotes a broad range of interests that are secured by 'existing rules of understanding.'" The Court continued at pages 601-602:

> "A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown. Yet, absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.'"

Congress in passing the Civil Rights Act of 1964 (42 U.S.C. §2000 et seq.), further assured employment rights and opportunities "by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." (Quoting Justice Powell's majority opinion in Alexander v. Gardner - Denver, ____ U.S. ____, 7FEP cases 81, 84.) The Fourteenth Amendement recognizes the validity of property interests in employment.

It is admitted that appellant is a probationary teacher. For him to claim the benefits of procedural and substantive due process guarantees, he must show certain attributes of "property" interests that are duly entitled to due process protection. The Court, in Board of Regents v. Roth, supra, sought to describe the property interests which are duly protected. At page 577, the Court said:

> "...To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is the purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> * * *
>
> "Property interests, of course, are not created by the Constitution. Rather, they are created in the dimensions as defined by the existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits...." [Emphasis supplied.]

In the Roth case, the teacher involved had a one-year contract of employment. At the end of the contract, the Court stated, he no longer had an expectation of continued employment. In the instant case, the probationary teacher involved, Francis C. Plano, was appointed to a probationary term pursuant to §3013 of the Education Law of New York. Section 3013 (1) (a) states:

> "Teachers...shall be appointed by a majority vote of the board of education or trustees upon the recommendation of the district superintendent of schools from lists submitted to such district superintendent...for a probationary period of five years." [Emphasis added.]

Thus, as opposed to the Roth case, wherein the teacher had an expectation of only a one-year appointment, in the instant case, a probationary teacher under §3013 of the Education Law is appointed to a term of five years.

The question arises of whether a teacher appointed to a five-year probationary term has a reasonable expectation of continued employment for that term. A second, and just as meaningful question arises as to whether the teacher's employer, a school board, has the same expectancy of a probationer's term of employment. For, it is not enough that one party has a unilateral expectation of re-employment; rather, both parties must have an expectancy of continued employment [Board of Regents v. Roth, supra.].

It is submitted that the property interests of the appellant were created and their dimensions were defined by existing rules or understandings stemming from the state law of the State of New York, the rules and understandings securing such benefits and claims of entitlement to continued employment. The Agreement signed by appellant Plano and the appellee Board of Education of the Westmoreland Central School District, Exhibit "B" of Plano's Complaint (15a) submitted in the instant case, entitled "RECORD OF PROBATIONARY APPOINTMENT," states:

> "By a majority vote of the board of education at a meeting held on (date) 6/27/72 the above named teacher [Francis c. Plano] was appointed in the tenure area indicated for a probationary period of 5 years. The starting date for such probationary period is 7/1/72.

It is signed by appellee Frank R. Melie, Clerk, and by appellant Francis C. Plano. This notice, in effect, is evidence of an agreement between the parties of an appointment made by the Board to Plano for a probationary term of five years. The two parties have expectations from this probationary appointment: to wit, the probationary teacher expects to serve out a five-year term, during which he will be evaluated and finally, at the end of the term, either appointed or denied tenure;

the board of education expects the five-year probationary term to permit the school system to evaluate the teacher prior to a decision regarding the grant or denial of tenure. Although the agreement is terminable by either side, it contains mutual obligations and is thus not an illusory contract.

The New York State Education Law places obligations on the parties to a probationary appointment. - These obligations apply to the probationary teacher and to the employing board of education. For instance, §3019-a of the Education Law provides:

> "A teacher who desires to terminate his services to a school district at any time, shall file a written notice thereof with the school authorities of such school district or with the board of cooperative educational services or county vocational education and extension board at least thirty days prior to the date of such termination of services."

The failure of a teacher to provide such written notice can result in a loss of certification for the teacher or other penalty to be assessed. See e.g., Matter of Eisman, 8 Ed. Dept. Rep. 31 (censure and reprimand for failure of teacher to file timely §3019-a notice). Section 3019-a also requires a termination notice to be given a teacher by his employer thirty days in advance. These responsibilities of notice attend and are part of the employment relationship. Under §3013 of the Education Law, a probationary teacher who is to be terminated during the probationary term or at the end of the probationary term upon recommendation of the district superintendent, is entitled, upon request, to written reasons therefor. It is clear that both §§3019-a and 3031 provide procedures for terminating the probationary relationship. This is a legislative and statutory acknowledgment of the fact that a teaching relationship embodies within it certain expectations on both sides, as

well as certain guarantees for the continuance of employment or the initiation of termination.

Furthermore, it is to be assumed that a board of education does not appoint a teacher to a five-year probationary term if it expects the teacher to be terminated before the end of the five-year term. If a board of education did not expect a teacher to successfully complete a probationary period and become tenured in the system, the board of education, it is submitted, would never have hired the teacher. By the same token, a teacher would not accept a five-year probationary appointment from a board of education if the teacher expected to be terminated by that board of education arbitrarily or by whim during the five-year period. Thus, the actual hiring of a teacher produces a set of expectations, which are bilateral rather than unilateral, concerning the employment relationship of the parties.

The Commissioner of Education and the courts have recognized that a probationary period is not merely one which is renewable every year, but is indeed made for the duration of the period. See Matter of Humphrey, 73 St. Dept. Rept. 185, affirmed, 283 App. Div. 376, 128 N.Y.S. 2d 155 (Third Dept., 1955). See also Carter v. Kalamejski, 255 App. Div. 694, 8 N.Y.S. 2d 926 (Fourth Dept., 1939), affirmed 280 N.Y. 802 (1939). Although a salary notice may be sent to a teacher at the end of each school year, this is not a renewal of the probationary term, but concerns only the salary to be paid during each year of the teacher's employment.

The Education Law of the State of New York acknowledges in additional ways the employment relationship between a teacher and a board of education and its agents, including the manner of granting probationary

status, and granting or denying tenure at the end of the probationary period. Section 3031 does not grant a board of education the sole right to terminate a probationary teacher during the probationary term, but divides this right between the board and the district superintendent. A district superintendent may not terminate a probationary teacher during the probationary term without the approval of the board of education. Thus, there is a procedural expectancy on the part of a probationary teacher, that he will not be terminated during the term of his probationary period without, at the very least, compliance with the procedures embodied in §3031. See Matter of Little, (Sup. Ct., Nassau County, November 1, 1972, Lynde J., aff'd 346 N.Y.S. 2d 575, 42 App. Div. 2d 782 (2nd Dept., 1973) attached as Appendix "E".

Section 3013 of the Education Law provides that no probationary teacher may be appointed to a probationary term without being recommended by the district superintendent of schools and approved by the board of education. A district superintendent may not appoint a probationary teacher without the board of education's approval, nor may a board of education approve a probationary teacher's appointment without the approval of the district superintendent. Similar procedures apply to the granting or denying of tenure at the end of the probationary period.

It is thus clear that a probationary teacher in the State of New York, is not merely an appointee serving at the will or whim of a board of education. A probationary teacher is employed within a statutory framework within which his obligations and rights to his position are defined. The employment relationship embodies both objective and subjective relationships between the board of education, the board's agents,

and the probationary teacher. Between the probationary teacher and his employer there exists more than just a unilateral expectation of continued employment. The practice, the statute and the rules of the State clearly establish the existence of a property interest in the appellant, i.e., expectancy of continued employment for a probationary term which cannot be denied without due process of law.

B. Appellant's Contractual Right to Exercise Academic Freedom.

In addition to a property interest in the expectancy of continued employment, appellant had a contractual interest in the maintenance of his right to academic freedom. Article 30 of the collective agreement in force and effect between Plano's labor organization, the Westmoreland Teachers Association, and appellee Board of Education (by its agent, the Supervising Principal), contractually provided for academic freedom and recognized the legitimacy of teacher discretion in making classroom decisions. (See Exhibit "N" of Complaint at 35a.)

Appellees deprived Plano of this contractual benefit without due process of law in that they terminated him for exercising his contractually guaranteed right to academic freedom. At no time prior to Plano's assignment of a composition on attitudes toward pre-marital sex was he told that the topic was prohibited. Indeed, Plano provided appellees with a lesson plan containing the assignment on the day prior to the assignment (See Exhibit "C" attached to the Complaint at 316a).

Appellant not only was never told that sex was a taboo subject in appellee Board's school system, but he was encouraged by appellees to attend an in-service training session at which the topics of teenage

pregnancy and venereal disease were discussed. It would be curious, indeed, if under Board auspices teachers were given training in sex problems of teenagers, but not permitted by the same Board to relay this information to their classes. This country's laws have long recognized that no person should be punished for conduct unless such conduct has been proscribed in clear and precise terms. Connally v. General Construction Co., 269 U.S. 385, 391 (1926). See also Moore v. Gaston County Board of Education, 357 F. Supp. 1037 (1973), teaching of evolution in Gaston County, North Carolina; Mailloux v. Kiley, 323 F. Supp. 1387 (D. Ct., D. Mass., 1971), aff'd 448 F. 2d 1242 (1st Cir.) writing of taboo sex words on a classroom blackboard.

Plano's contractual right to academic freedom is constitutionally protected. The Fourteenth Amendment's procedural protection of property safeguards the wide variety of interests a person has acquired in specific benefits. Board of Regents v. Roth, supra, at page 576.

In Perry v. Sindermann, supra, a college teacher on a yearly contract was held to have a property interest in his employment due to language found in a policy memorandum issued by his school, and due to a statement regarding continuance of employment found in a faculty handbook. In the instant case, the right to academic freedom is embodied in the collective agreement covering the relationship between the Westmoreland Board of Education and the appellant, Francis C. Plano. If a property interest in employment can be derived from a memorandum of policy and a faculty handbook, how much more evident is the nature of an employment relationship existing in a contract provision.

In addition, it must be remembered that the First Amendment also protects appellant's right to academic freedom. See Keyishian v. Board of Regents, 385 U.S. 589 (1967); Epperson v. State of Arkansas, 393 U.S. 97 (1968).

POINT V

APPELLEES ACTING INDIVIDUALLY AND IN CONCERT HAVE DEPRIVED APPELLANT OF HIS INTEREST IN LIBERTY WITHOUT DUE PROCESS OF LAW.

The concept of liberty guaranteed by the Fourteenth Amendment to the United States Constitution has been defined to include the right to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men. (Meyer v. Nebraska, 262 U.S. 390.) It has also been defined to include the individual's interest in his own good name, reputation, honor or integrity. (Board of Regents v. Roth, 408 U.S. 564, at p. 573.) The Supreme Court has held, in Wisconsin v. Constantineau, 400 U.S. 433:

> "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." [Emphasis supplied.]

Also in accord, Arnett v. Kennedy, ___U.S.___, 42 L.W. 4513 (April 16, 1974).

Thus, where charges have been made against an individual which could seriously damage his standing and associations in his community, due process would accord an opportunity to refute those charges. Similarly, where there has been a suggestion that termination of employment has imposed a stigma or other disability which has the likelihood of foreclosing future employment opportunities, a right to a due process hearing attaches. Meyer v. Nebraska, supra. See also Schware v. Board of Bar Examiners, 353 U.S. 232; Birnbaum v. Trussell, 371 F. 2d 672 (2d Cir., 1966).

In Exhibit "M" of appellant Plano's Complaint (32a), the Board of

Education notes that it received a formal complaint regarding an assignment given to Plano's students, and that the Board found that the complaint had merit. Appellee Baker, the supervising principal, reviewed the documentation of "several other incidents involving this teacher in the 1972-73 school year." It may therefore be assumed that appellee Board of Education was apprised of these complaints. Yet, there is no evidence that Plano was ever given an opportunity to reply to these complaints or incidents, nor that these complaints or incidents were included in the statement given Plano by the supervising principal or the district superintendent as reasons for his termination.

It was also alleged in the complaint that appellee Board and its individual members, acting in concert, had considered other grounds, in addition to those aforementioned, for determining to terminate Plano's employment. That among these grounds were allegations of immorality involving the dating of a ninth grade female pupil. The potential imposition of a stigma attaching to a teacher terminated on grounds of immorality is sufficient to warrant due process of law. Moore v. Knowles, 482 F. 2d 1069 (5th Cir., 1973); Board of Regents v. Roth, supra, at page 573; Francis v. Ota, 356 F. Supp. 1029 (D. Hawaii, 1973); Dause v. Bates, ___ F.Supp. ___, 84 LRRM 2730 (W.D., Ky. 1973).

In addition to the abovementioned reasons for granting appellant Plano a full hearing regarding his dismissal is the additional stigma imposed upon Plano of being summarily dismissed during a school year. The clear implication of such action is that Plano's conduct was so egregious that his continued employment was impossible, and that appellees could not even wait to the end of the school semester, let alone the school year, to sever the employment relationship. It is difficult to realize a more prejudicial mark on a teacher's record than a summary mid-term termination. This implies grievous

conduct, and for this reason alone, Plano should be accorded due process rights to protect his professional and personal reputation and future employment opportunities.

In Cooley v. Board of Education, 453 F. 2d 282 (8th Cir., 1972), decided prior to the Sindermann and Roth cases, a teacher was dismissed without a hearing in the middle of a school term. Although the teacher was hired pursuant to a one-year contract, the court did not rely on a contractual theory for requiring due process. The court found:

> "Given the ensuing economic hardship of a summary deprivation of the source of one's livelihood, and in view of the awesome and potentially stigmatizing effect of mid-year termination, such a case as this assuredly presents one of the clearest instances where the rule of procedural Due Process, properly applied, must operate to interdict injurious and reckless governmental treatment."

In Arnett v. Kennedy, supra at page 4524, Justice Marshall in his dissent quotes from a report by the United State's Administrative Conference:

> "[O]ne must acknowledge what seems to be an accepted if regrettable fact of life: removal from governmental employment for cause carries a stigma that is probably impossible to outlive. Agency personnel officers are generally prepared to concede...that it is difficult for the fired government worker, to find employment in private sector."

Pre-termination due process has been required where a non-tenured teacher's professional or community reputation is threatened. Whitney v. Board of Regents, 355 F. Supp. 321 (D. Ct., C.D. Wisc., 1973); Roumani v. Leestamper, 330 F. Supp. 1248 (D. Ct., D. Mass., 1971). In the instant case, appellant's dismissal in mid-term and allegations concerning his moral character present issues mandating a prior due process hearing.

Under the Education Law of the State of New York, a board of education can act to terminate the employment of a probationary teacher only after

receipt of a recommendation from the district superintendent of schools to that effect. In the instant case, appellee Board of Education requested the district superintendent to recommend termination so that it could terminate Plano (Complaint Exhibit "D" at 17a).

It is a well-established proposition of constitutional law that an essential element of due process is a neutral and detached tribunal. Ward v. Village of Monroeville, 409 U.S. 57 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Commonwealth Coatings Corp. v. Continental Casualty, 393 U.S. 145 (1968); In re Murchison, 349 U.S. 133 (1955); Tumney v. State of Ohio, 273 U.S. 510 (1927). See also Donnon v. Civil Service Commission, 3 Pa. Comm'lth. 366, 283 A. 2d 92; Spano v. School District of Borough of Brentwood, 439 Pa. 256, 267 A. 2d 848 (1970); Gardner v. Repasky, 434 Pa. 126, 252 A. 2d 704 (1969); Pregent v. New Hampshire Department of Employment Security, 361 F. Supp. 782 (D. Ct., D. New Hampshire, 1973); Wagner v. Little Rock School District, Case No. LR-72-C-59, D. Ct., E.D. Arkansas, decided September 14, 1973.

In the instant case, appellee Board ultimately decides the question of termination of a probationary teacher during the probationary term. As such, the Board is, in effect, the independent magistrate who determines the case made out by the district superintendent for dismisal. Where the Board not only is the final decision-maker, but also requests termination prior to its decision to terminate, there is strong evidence that the case has been pre-judged. In the instant case appellee Board of Education requested the district superintendent to request termination (17a). It is clear that the Board cannot now make an unbiased appraisal of that recommendation, nor fairly consider appellant Plano's reply in response to any statement of reasons furnished by the District Superintendent in support of his recommendation.

As was stated by the Supreme Court of Pennsylvania in Gardner v. Repasky, supra, a case in which a police officer was suspended:

> "'***[A]ny tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias. Commonwealth Coatings Corp. v. Continental Casualty, 393 U.S. 145 (1968).

Certainly, appellee Board of Education cannot be considered to have avoided even the appearance of bias. Appellant submits that the Board and its individual members were not impartial.

In Winnick v. Manning, 460 F. 2d 545 (1973), the Court of Appeals for the 2d Circuit had occasion to consider the nature of procedural due process rights to be accorded to a university student accused of disrupting a test. The student was accorded a hearing to determine culpability. The charging party was the dean of students, and the decision-maker was the assistant dean of students.

The Court found the hearing to be valid. It observed that there was nothing on the record to show that the decision-maker "observed, investigated or made any prehearing decisions about [the student's] conduct.... In short [the assistant dean], did not have such prior official contact with [the student's] case as to give rise to a presumption of bias." See also Simard v. Board of Education, 473 F. 2d 988 (2d Cir., 1973). In the instant case, the decision-maker is the same body that requested a recommendation for dismissal and determined to terminate.

Since appellee Board was already predisposed to terminate Plano, it could not fairly consider Plano's reply to the reasons given by the district superintendent for recommending termination. The Board could not render an impartial and neutral decision respecting the merits of dismissing appellant

during the course of his probationary term. Therefore, the decision of the Board, acting individually and in concert, should be nullified and vacated.

An evidentiary hearing should be conducted to ascertain and determine the allegations considered by appellee Board in terminating appellant. In addition, appellant should be given a hearing before a neutral reviewing body to hear and have opportunity to refute any allegations concerning his character, honesty and integrity. At the hearing, appellant Plano should also be given an opportunity to refute appellee Board's findings against him.

Additionally, by not making any record explicating its reasons and by considering the issue of Plano's discharge in executive session, there exists no record for the Commissioner of Education and/or any Court to review. This in and of itself constitutes a denial of due process. See e.g. Kinsella v. Board of Education, supra and Raper v. Lucey, 488 F. 2d 748 (1st Cir., 1973). In Raper, supra, a case concerning denial of the right to be licensed to drive a motor vehicle, the First Circuit held at page 753:

> "Without a statement of reasons, an applicant would not know what, or for that matter whether to appeal. Reasons for governmental action affecting important individual rights must be timely proferred in order to satisfy due process."

POINT VI

DUE PROCESS DEMANDS AN ASCERTAINABLE RECORD UPON WHICH JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS CAN BE PREDICATED.

At its meeting of November 2, 1973, appellee Board as a whole, and its members acting individually, voted to terminate appellant's employment. They gave no reasons for such termination, although reasons were requested by appellant several times previously. The Board in a press release attached as Exhibit "M" to the Complaint (32a) gave a summary of "the process and its actions." This summary did not indicate what specific information the Board considered in order to make its decision. It made no statement of findings; it made no justification of its determination. It merely stated that it decided to terminate appellant's employment. With no evidence before it, nor any official record of its proceedings, it is impossible for the Board's action and the actions of all other appellees to be evaluated by an appropriate judicial or administrative authority. See Raper v. Lucey, supra.

The concept of giving reasons for an administrative determination so that the determination is subject to judicial review is not a new one. As Professor K.C. Davis states in his five volume treatise on administrative law, Administrative Law Treatise, §16.05 ("Practical Reasons for Requiring Findings"):

> "The practical reasons for requiring administrative findings are so powerful that the requirement has been imposed with remarkable uniformity by virtually all federal and state courts, irrespective of a statutory requirement. The reasons have to do with facilitating judicial review, avoiding judicial ursurpation of administrative functions, assuring more careful administrative consideration, helping parties plan their cases for rehearings and judicial

review, and keeping agencies within their jurisdiction."

In United States v. Merz, 376 U.S. 192, 198 (1964), the Supreme Court noted in a case involving a commissioner's determination of the issue of just compensation in an eminent domain proceeding:

> "Conclusory findings are alone not sufficient, for the commission's findings shall be accepted by the Court 'unless clearly erroneous'; and conclusory findings as made in these cases are normally not reviewable by that standard, even when the District Court reads the record, for it will have no way of knowing what path the commissioners took through the maze of conflicting evidence. See United States v. Lewis, 308 F. 2d 453, 458. The commissioners need not make detailed findings such as judges do who try a case without a jury. Commissioners, we assume, will normally be laymen, inexperienced in the law. But laymen can be instructed to review the reasoning they use in deciding on a particular award, what standard they tried to follow, which line of testimony they adopt, what measure of severance damages they use, and so on. We do not say that every contested issue raised on the record before the commission must be resolved by a separate finding of fact. We do not say that there must be an array of findings of subsidiary facts to demonstrate that the ultimate finding of value is soundly and legally based. The path followed by the commissioners in reaching the amount of the award can, however, be distinctly marked. Such a requirement is within the competence of laymen; and laymen, like judges, will give more careful consideration to the problem if they are required to state not only the end result of their inquiry, but the process by which they reached it."

See also Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962); United States v. Forness, 125 F. 2d 928, 942-943 (2d Cir.,1942), cert. den. 316 U.S. 694 (1942); United States v. Lewis, 308 F. 2d 453, 465 (9th Cir., 1962); Kinsella v. Board of Education, supra.

In Burlington Truck Lines, Inc., supra, a case concerning review of an Interstate Commerce Commission decision, quoting Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 196, the Court stated at page 169:

> "[A] simple but fundamental rule of administrative law...is...that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action..."

Thus, a decision by an administrative agency, the facts relied on, and the reasoning, are indispensable for a court to either uphold or dismiss an agency determination. The instant case is widely at odds with this administrative requirement. There is no transcript or record prepared of the Board of Education's decision concerning Plano's employment; no statement of the charges considered, nor is there a formal decision in any form which states the reasons for its conclusion, nor the findings of fact upon which they were based.

As Justice Cardozo stated in United States v. Chicago, Maine, St. Paul and Pennsylvania R.R., 294 U.S. 499, 510-511 (1935):

> "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

Administrative findings must be available for review to help protect defendants against careless or arbitrary actions by an administrative body. As Judge Frank stated in United States v. Forness, supra:

> "Chief Justice Hughes once remarked, 'An unscrupulous administrator might be tempted to say 'Let me find the facts for the people of my country, and I care little who lays down the general principles.'. That comment should be extended to include facts without due care as well as unscrupulous fact-finding: for such lack of scruples, which we trust, seldom exists. And Chief Justice Hughes' comment is just as applicable to the careless fact-findings of a judge as to that of an administrative officer. The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary

should at least measure up to the same standards. 125 F. 2d at 942."

See also Russo v. Central School District No. 1, et al., 469 F. 2d 623 (2d Cir., 1972), wherein the court in reviewing the district court's action, relied upon the Forness case for support of its rejection of the district court's findings; and New York v. United States, 342 U.S. 882 (1951) wherein Justice Douglas stated in a dissenting opinion:

> "Unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty."

See also Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177 (1941).

The courts of the State of New York have just begun to recognize this concept, most recently in the case of Matter of Application of Thomas A. Cummings v. Regan, ____ M. 2d ____, 350 N.Y.S. 2d 119 (Sup. Ct., Erie County, 1973). The principal has also been ennunciated in Matter of the Application of Michael Cummings, et al. v. Regan, ____ M. 2d ____, 350 N.Y.S. 2d 842 (Sup. Ct., Albany County, 1973), decided by Justice Edward S. Conway. These two decisions deal with granting reasons for denial of parole to inmates in state correctional facilities. In Matter of the Application of Michael Cummings, et al., Justice Conway stated at 350 N.Y.S. 2d 847:

> "...the Board must, however briefly, state the ultimate ground of its decision denying parole with sufficient particularity to enable the prisoner to understand how he is expected to regulate his behavior and to enable a reviewing court to determine whether inadmissable factors have influenced the decision and to determine whether discretion has been abused." [Emphasis supplied.]

In Matter of Thomas A. Cummings, supra, Justice Doerr in his decision

stated at 350 N.Y.S. 2d 127:

> "The respondents assert that matters relating to release are not reviewable by the court if done according to law. The law as presently constituted gives the Board tremendous powers in making its decisions on parole release. The law also passes to the Board tremendous responsibilities. Under the present policy system, there is no basis upon which to make an informed judgment in determining if the Board is exercising its powers in a lawful and responsible fashion. To merely state that they are acting in accordance with law in a responsible manner is to state a conclusion. If the Board is acting in a lawful and responsible manner, and the Court has no reason to believe it is not, there should be no discomfort in complying with minimal due process requirements in giving reasons for parole denial. In carrying out any statutory mandate, it is imperative that not only justice be done but that the appearance of justice be apparent. Unless the courts stand apart from administrative bodies, especially those which exercise a quasi-judicial function, so that they can review objectively the actions of these bodies, there can be no appearance of justice.*** It is difficult to conceive of anything more arbitrary than a terse negative response therefore, especially when a negative answer may be entirely reasonable and proper.*** The law provides for discretion, not secrecy."

See also Gold v. Nyquist, App. Div. 2d ____, 349 N.Y.S. 2d 165 (3d Dept., 1973).

Section 3031 of the Education Law of New York requires that where a recommendation for termination of a probationary teacher has been mad by a district superintendent, that the teacher be given reasons therefore upon his written request, and that the teacher be given an opportunity to reply. In order for this statute to be meaningful, the final decision-maker, a board of education, must be impartial and capable of judging the veracity of reasons and/or replies given to it. In the instant case appellee Board is not impartial because it requested its district superintendent to make

a recommendation to terminate appellant Plano (17a). In addition, the Board denied Plano an opportunity to request a full disclosure of the complaints against him and an opportunity to reply thereto. In any case, the Board's actions and those of the other appellees in the instant case are arbitrary, cparicious and present no record for judicial review. This violates any concept of administrative due process and must be subjected to the light of judical review.

In Kinsella v. Board of Education, ____ F. Supp. ____ (February 20, 1974), a three-judge district court held §3020-a of the New York Education Law unconstitutional for failing to require an administrative decision-maker to be bound by a record, to set forth the facts it relied on in making its decision, and for failing to require the reasons for its administrative determination. Although the case involved a tenured teacher, it is submitted that appellant's property interest in the maintenance of his contractual right to exercise academic freedom, and his liberty right to the maintenance of his good name and reputation require a hearing and an ascertainable record for judicial review.

The arbitrary and capricious nature of the Board's conduct in the instant case is especially ripe for judicial review, since appellee Board of Education made clear in its statement, Exhibit "M" attached to the Complaint (32a), that it considered many things which were not specified in the reasons given by appellee district superintendent for his recommendation for Plano's termination. Since the Board considered reasons and allegations of which appellant Plano was not informed, Plano could make no intelligent reply, and could in no way refute his unknown accusers. Therefore, any decision by appellee Board, acting individually or in concert, was arbitrary, capricious, affected by

errors of law and fact, and a clear denial of procedural and substantive due process of law.

POINT VII

APPELLEES ACTING INDIVIDUALLY AND IN CONCERT HAVE ABRIDGED APPELLANT'S FIRST AMENDMENT GUARANTEE OF FREEDOM OF SPEECH.

The Supreme Court has made clear that a person may not be denied employment on grounds which infringe upon constitutionally protected interests -- especially freedom of speech. This applies whether a person has a "right" to continued employment or no right to continued employment. Where a government can deny a benefit to a person because of his constitutionally protected freedom of speech or association, his exercise of those freedoms would in effect be penalized and inhibited. Perry v. Sindermann, 408 U.S. 597 (1972); Shelton v. Tucker, 364 U.S. 479; Keyishian v. Board of Regents, 385 U.S. 589. Thus, allegations that a governmental body has terminated the employment of an employee for utilizing his first amendment freedoms presents a bona fide constitutional claim. Perry v. Sindermann, supra, at p. 598.

It is clear that teachers are included under protection of the First Amendment:

> "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506.

See also Pickering v. Board of Education, 391 U.S. 563, 568.

In the instant case, in his open letter, Exhibit "L" of the appellant's Complaint (31a), appellee Board member, Howard Walker, stated one reason for Plano's termination:

> "It is my own feeling that we should encourage all individuals to express themselves in their own unique way within the framework society has established. I feel that Mr. Plano has done this and should not have

> his professional career jeopardized. I also feel that Mr. Frank Plano has been an individual who felt strong enough about his convictions to stand up and express his feelings even though it did not conform to expected behavior. How will we ever teach young people to express themselves if we won't permit our professional educators to do the same."
>
> * * *
>
> "...We encourage freedom and expression from our students and in the same breath ostracize teachers who have the courage to be different, to express their views and demonstrate the firmness of their convictions."

This plainly indicates one of the true reasons for appellee Board's termination of appellant Plano's employment. That is, Plano was in part terminated for discussing in public and/or in the classroom, topic or topics unnamed. It is appellant's belief that one of these topics was a class assignment and a discussion of students attitudes regarding premarital sex. That the Board's decision to terminate was based at least partly upon appellant's exercise of his First Amendment rights is made clear by review of Exhibit "M" attached to appellant's Complaint (32a), wherein appellee Board, acting individually and in concert, stated in a public release regarding Plano:

> "The supervising principal and the high school principal received a formal complaint regarding an assignment given to the students by the teacher. Upon investigation, it was found that the complaint had merit. The high school principal and the supervising principal met with the teacher, and the teacher was given full opportunity to justify his action."

The assignment above noted was a composition on the subject of premarital sex. Its inclusion in the class lesson was a result of an in-service workshop, at which Plano and his supervising principal, appellee Baker, attended. Both the subjects of teenage pregnancy and venereal disease were discussed. This

in-service workshop was sanctioned by appellee Board as part of the in-service training given all teachers. Desirous of combining the intricacies of english grammer and composition with the school's concern for teen-age morality exhibited at the in-service workshop, Plano determined to assign students a composition. The assignment was given pursuant to a lesson plan, Complaint Exhibit "C" (16a), and turned in to Plano building principal the day prior to the assignment. The lesson plan was not rejected at that time or any time prior to the assignment.

It must be noted, that a mere discussion with appellant of a parent's complaint by a high school principal and supervising principal does not satisfy due process requirements. Appellee Board was not involved, no witnesses were called, nor cross-examination permitted. See Wagner v. Little Rock School District, supra.

The open letter of appellee Board, Exhibit "M" attached to Plano's Complaint (32a), made note of other incidents relied upon by the Board in making its decision to terminate appellant. These incidents have not been enumerated, evidentiary hearings should be held thereon to determine the nature and substance of the incidents considered. It is appellant's contention that the incidents referred to by the Board concerned protected speech, and their denial constituted a violation of appellant's First Amendment freedoms.

Although academic freedom is not one of the enumerated rights of the First Amendment, the Supreme Court has emphasized:

> "Scholarship cannot fluorish in an atmosphere of suspicion and distrust. Teachers of students must always remain free to inquire, to study and

and to evaluate..." Sweezy v. New Hampshire, 354 U.S. 234, 250.

In Keyishian v. Board of Regents, supra, at page 603, the Supreme Court noted:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. *** The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"

Consistent with the concept of academic freedom is the teaching of controversial subjects. The teaching of controversial subjects is of great importance in our classrooms. Keyishian v. Board of Regents, supra, at page 603. The Supreme Court in Wieman v. Updegraff, 344 U.S. 183 (1952), in the concurring opinion of Justices Frankfurter and Douglas, at pages 196-197 stated:

> "That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it can be disciplined and responsible. It can be disciplined and responsible only if habits or openmindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.
>
> "To regard teachers--in our entire educational system, from the primary grades to the university--as the priests of our democracy is therefore not to indulge in hyperbole. It is a special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened

> and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble paths if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by National or State government."

In the case at bar, it is a curious anomaly that the same Board of Education which knowingly approves of in-service teacher training in the subjects of venereal disease and teenage pregnancy should regard a class assignment on student attitudes toward premarital sex as "controversial."

Recent decisions have indicated that termination for the teaching or employment of "controversial" matter is improper and a violation of teachers' First Amendment rights. In Jervey v. Martin, 336 F. Supp. 1350 (W.D. Virginia, 1972) a district court found that a complaint alleging that a letter written by plaintiff teacher to a national magazine, approving an article which appeared therein on premarital sex, was the cause of a consequent denial of salary increase by defendant state university, set forth a cause of action cognizable before a federal court. The case was settled in early 1973 with a retroactice salary increase and stipulation against further action against plaintiff teacher.

The United States Court of Appeals for the First Circuit in Keefe v. Geanokos, 418 F. 2d 359 (1st Cir., 1969), in granting a preliminary injunction held that the use by a teacher of a taboo sex word was not cause for dismissal

since the teacher had received no prior warning of any school regulation regarding use of vulgar language in the learning process, and that students of senior high school age were already familiar with such words and had access to books in the school library employing such words. In the instant case, books concerning sex were certainly available to students in community libraries, and furthermore there is no allegation made by appellees that Plano violated school policy against the use of sex related topics in the academic curriculum of the school.

In Mailloux v. Kiley, supra, where a teacher was discharged for writing a taboo sex word on the blackboard, the court noted at page 1391:

> "The teacher who responsibility has been nourished by independence, enterprise, and free choice becomes for his student a better model of the democratic citizen. His examples of applying and adapting the values of the old order to the demands and opportunities of a constantly changing world are among the most important lessons he gives to youth."

The court noted that academic freedom is not confined to conventional teachers or to those who could get a majority vote from their colleagues. Although the court found that subjects could be regulated, it stated that the state may not suspend or discharge a teacher

> "...unless the state proves he [the teacher] was put on notice either by regulation or otherwise that he should not use that method."

In the case at bar appellant in no way was warned against employing student attitudes toward sex as a topic in his English class; nor was he informed that it was an unsuitable way of teaching writing skills.

The aforementioned rulings have also been followed in Lindros v. Governing Board of the Torrance Unified School District, 108 Cal. Reptr. 185, 510 P. 2d 361 (Sup. Ct. of California, 1973), affirmed ___ U.S. ___ (1974) wherein a

probationary teacher read a short story containing a taboo expression. The court held that in the absence of regulations or rules promulgated by the school system, plaintiff could not be discharged.

Plano has not commenced instructing a course on sex education in appellees' school system. Seeking to interest students in learning the basic writing skills attendant to good English usage, he assigned a composition on student attitudes toward pre-marital sex. For those reasons appellees have curbed appellant's First Amendment rights by discharging him from his employment. Plano submits that this is a violation of his constitutional rights.

POINT VIII

APPELLANT SOUGHT NO ORAL ARGUMENT ON HIS MOTION FOR A TEMPORARY RESTRAINING ORDER, BUT EXPECTED THE COURT TO ORDER ARGUMENT BEFORE GRANTING A PRELIMINARY INJUNCTION.

At Page 9 of its Memorandum - Decision and Order (301a), the District Court noted:

> "Counsel for the plaintiff seemed content to allow decision on the papers alone and there was no request or desire for an evidentiary hearing conveyed to me during oral argument. The facts of this case are crucial in the determinations requested and must be developed as fully and clearly as possible."

Appellant Plano's motion for a temporary restraining order was requested to preserve his employment prior to a hearing on his motion for a preliminary injunction. At no time did appellant expect this Court to issue a preliminary injunction without a hearing. Indeed, appellant expected that an evidentiary hearing would have been had prior to the determination of his motion for a preliminary injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure. See Moore's Federal Practice, 2d Ed. ¶65.04 [3] at page 65-59.

In point of fact, Judge Foley dismissed the appellant's motion for injunctive relief for want of jurisdiction (300a), making no determination on the merits as would be required by Rule 52(a) of the Federal Rules of Civil Procedure. See Moore's Federal Practice, 2d Ed., ¶65.04[3] at pages 65-59 to 65-65. Thus, he mooted any necessity for holding a hearing. The only issue being argued before the court when it heard the initial arguments was whether a temporary restraining order should be issued and a hearing held on the issue of the preliminary injunction. Thus the Court's conclusions as to

counsel's intentions were presumptious and in error. (238a - 245a)

Additionally, the question of whether the Court could in effect order a retroactive monetary remedy would require a hearing to consider the question of irreparable injury warranting injunction relief. See Public Health and Welfare Employees v. Missouri Department of Public Health and Welfare, 411 U.S. 279 (1973) and Edelman v. Jordan, ____U.S.____, 42 L.W. 4419 (March 25, 1974).

CONCLUSION

Appellant Plano has standing. He has made allegations of both present and continuing denials of constitutional rights by appellees. The District Court has concurred in the gravity of the charges alleged by appellant and has indicated the necessity of their resolution (299a).

Exhaustion of administrative remedies is unnecessary in the case at bar because federal statutory law gives appellant Plano a remedy in a federal forum supplementary to those which may exist in a state administrative or judicial forum. Alexander v. Gardner - Denver, supra; McNeese v. Board of Education, supra. Exhaustion of remedies is also unnecessary because procedural administrative barriers make appeal to the Commissioner of Education futile. A temporary restraining order should be granted and a hearing on the motion for a preliminary injunction should be had because of the gravity of the harm alleged. Steffel v. Thompson, supra.

The case at bar should be remanded to the District Court for reconsideration of the application for a temporary restraining order and motion for a preliminary injunction. Additionally the instant case should be remanded to the District Court for trial on the merits.

Respectfully submitted,

BERNARD F. ASHE
Attorney for Appellant
80 Wolf Road
Albany, New York 12205
Tel. No. (518) 459-5400

By: Bernard F. Ashe
Bernard F. Ashe

James R. Sandner
Ivor R. Moskowitz
Of Counsel

Dated: June 3, 1974

ARTICLE 18

Grievance Procedures

Nothing contained herein will be construed as limiting the right of any teacher having a possible grievance or problem to discuss the matter informally with any appropriate member of the administration and having said matter informally adjusted without intervention of the Association provided the adjustment is not inconsistent with the terms of this Agreement. Said adjustment is then binding upon the aggrieved party. In the event that any grievance is satisfactorily adjusted without formal determination pursuant to this procedure, said adjustment shall not create a precedent or ruling binding upon either of the parties to this agreement in future proceedings.

1. Grievance shall be defined as any claimed violation, misinterpretation, or inequitable application of the negotiated agreement.
2. Each teacher shall have the right to present his grievance free from interference, coercion, restraint, discrimination, or reprisal. The teacher shall have the right to be represented at all stages; the representative may be designated by the teacher at the time the grievance is presented or at a later date.
3. Any teacher who claims to have a grievance shall present his grievance to his building principal, orally, as soon as possible but not later than two (2) school days after the grievance occurs.
4. The building principal shall discuss the grievance with the teacher, shall make such investigation as he deems appropriate, and shall consult with the supervising principal to such extent as he deems appropriate, all on an informal basis.
5. Within three (3) school days after presentation of the grievance to him, the building principal shall make his decision and communicate the same to the teacher presenting the grievance.
6. If the teacher initiating the grievance is not satisfied with the decision at the conclusion of Step 5 and wishes to proceed further under the grievance procedure, the teacher shall, within five (5) school days, present the grievance to the Association's Grievance Committee for its consideration. If the Grievance Committee determines that the teacher has a meritorious grievance, then the teacher, represented by the Association, may file a written notice that an appeal will be made to the supervising principal. Such request shall be in writing and shall contain a statement setting forth the specific nature of the grievance and the facts relating to it. Such request shall be served upon both the supervising principal and the building principal to whom the grievance was originally presented. Thereupon, and within two (2) school days after receiving such request, the building principal shall submit to the supervising principal a written statement of his information concerning the specific nature of the grievance and the facts relating to it.

APPENDIX "A"

7. Unless the grievance is settled to the satisfaction of the grieving party, the supervising principal shall hold a hearing within five (5) school days after receiving the written request and statement. The teacher and the Association shall appear at the hearing and may present oral and written statements or arguments.
8. Within five (5) school days after the close of the hearing, the supervising principal shall make his decision and communicate the same in writing to the teacher presenting the grievance and to the Association.
9. The teacher, represented by the Association, may appeal a determination of the supervising principal to the Board of Education and request a hearing of the Board of Education.
10. Any hearing may be conducted by one or more members of the Board, provided that if less than the full Board presides at such hearing, the member or members conducting such hearing shall render a report thereon to the full Board of Education and the full Board shall thereon make its report. The teacher and the Association shall appear at the hearing, and may present oral and written statements or arguments.
11. The Board of Education shall report its findings of fact, conclusions, and advisory recommendations not later than fifteen (15) school days after completion of the hearing. The Board shall send a copy of its report to the teacher involved, the Association, the appropriate building principal, and to the supervising principal.
12. If the decision of the Board of Education is not satisfactory to both the aggrieved party and the Association, the Association may request in writing within ten (10) school days after such decision that the grievance be submitted to arbitration. An arbitrator shall be requested from the Public Employees Relations Board. The cost of an arbitrator shall be borne equally by both parties. The parties will then be bound by the rules and procedures of the Public Employees Relations Board. The arbitrator so selected shall confer with representatives of the Board and the Association and hold hearings promptly and will issue his decision as promptly as possible. The arbitrator's decision shall be in writing and will be final and binding upon the parties.
13. Failure at any stage of the grievance procedure to communicate a decision to the aggrieved party and the Association within the specified time limit shall permit the lodging of an appeal at the next stage of the procedure within the time which would have been alloted had the decision been communicated by the final day.
14. If this grievance procedure with binding arbitration is elected to be used, then the aggrieved party and the Association specifically waive any rights they may have to bring a Civil Action in State Court or appeal to the Commissioner; it being the intention of the parties hereto that the arbitration procedure is to be the sole and exclusive remedy.
15. The time limits specified for either party may be extended only by mutual consent.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF CAYUGA

IN THE MATTER OF

The Application of BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF AUBURN, NEW YORK

Petitioner

For a Judgment Staying the Arbitration Commenced by

AUBURN TEACHERS ASSOCIATION on behalf of MARY E. TAYLOR

Respondent

Appearances: WILLIAM GOLDMAN, ESQ.
Attorney for Petitioner

BERNARD F. ASHE, ESQ.
Attorney for Respondent

Memorandum - Decision

CLARENCE H. BRISCO, J. This is an application pursuant to the Civil Practice Law and Rules Section 7503(b) for judgment staying the arbitration between Auburn Teachers Association and the Board of Education of the Enlarged City School District of the City of Auburn, New York and all proceedings therein; vacating the demand for arbitration on the grounds that a valid agreement to arbitrate this matter was not made; and granting petitioner such other and further relief as to this Court may seem just.

The petition states that at a meeting of the petitioner Board of Education on July 20, 1970, Mary E. Taylor was appointed on a probationary term of three years as a teacher in the Auburn City School District effective September 1, 1970, and thereafter she served in that capacity until June 22, 1973.

The petition also states that the Auburn Teachers Association and the Board of Education entered into a contract pursuant to the Taylor Law under date of November 1, 1971, which contract was applicable to and including June 30, 1973. That in this agreement there is a provision for grievances, the grievance procedures and the personnel evaluation provisions. The agreement states that "a grievance shall mean any claimed violation, misinterpretation, or inequitable application of any matters included in this agreement." This agreement did not provide for any limitation of the power or authority of the Board of Education with reference to granting tenure as is provided in Section 2509 of the Education Law.

The power or authority of a Board of Education with reference to granting tenure is set forth in Section 2509 of the Education Law. Under this section it is solely within the exclusive province of a Board of Education as to whether tenure is to be granted to a person or denied to a person. The probationary period of three years automatically expires at the expiration of the three year term.

In the recent case of Board of Education v. Chautauqua Teachers Association 41 A D 2d 47, 341 N.Y.S. 2d 690, the Supreme Court, Appellate Division, Fourth Department states it is well settled that a "non-tenured teacher may be refused appointment without being given reasons therefor, or a hearing, and even despite the recommendation of a tenure appointment" citing as its authority the cases of Legislative Conference v. Board of Higher Educ., 38 A D 2d 478, 481, 330 N.Y.S. 2d 688, 692, affd. 31 N Y 2d 926, 340 N.Y.S. 2d 924. See, e.g., Matter of Pinto v. Wynstra 22 A D 2d 914, 255 N.Y.S. 2d 536; Matter of Butler v. Allen 29 A D 2d 799, 287 N.Y.S. 2d 197; Education Law, Sections 2573, 3012, 3013.

It appears that at a meeting of the petitioner Board of Education on July 20, 1970, the respondent, Mary E. Taylor was appointed on a probationary term of three years as a teacher in the Auburn City School District, effective September 1, 1970, and thereafter she served in that capacity until June 22, 1973. That the respondent Auburn Teachers Association and the petitioner Board of Education entered into a contract pursuant to the Taylor Law under date of November 1, 1971 which contract was applicable to and including June 30, 1973.

That in this agreement between the Auburn Teachers Association and the Board of Education there is a provision for grievance. A grievance procedure is contained in said agreement in Article XX and the personnel evaluation provisions in Article XXIII. The definition of grievance in said agreement is stated as meaning any claimed violation, misinterpretation, or inequitable application of any matters included in the agreement. Provision is made only for such grievances as are specified therein.

No provision was made inthe agreement for a limitation of the power or authority of the Board of Education with reference to granting tenure as is provided in Section 2508 of the Education Law which states that it is solely within the province of a Board of Education as to whether tenure is to be granted to a person or denied to a person. The probationary period of three years if no action is taken on it by the Board of Education to grant tenure, automatically expires at the expiration of the three year term. Arbitration in such a situation is not provided in the agreement because tenure was not a provision in said negotiated agreement.

It appears that on July 1, 1973 Dr. James D. Knox became Superintendent of Schools of the Auburn City School District. After reviewing this proceeding which had taken place prior to that time, under date of September 11, 1973, Dr. Knox wrote a letter in his capacity as superintendent of schools, to the respondent Mary E. Taylor, in which Dr. Knox stated that he would at the Board meeting of September 17, 1973 recommend Mary E. Taylor for tenure. At the September 17, 1973 meeting of this Board of Education, Dr. Knox made the recommendation as superintendent of schools that Mary E. Taylor be granted tenure. The Board of Education, however, after its consideration of this recommendation for tenure at the meeting of September 17, 1973 decided not to accept the recommendation of the superintendent of schools and by a vote of 5 to 4 decided not to grant tenure to Mary E. Taylor, the respondent.

By the recommendation for tenure for Mary E. Taylor made by Dr. Knox as superintendent of schools, the grievance procedure set forth in Article XX Stage 2 of the agreement was completed and no grievance remained.

It is the opinion of this court and it so finds that only a Board of Education has the authority and power under Section 2509 Education Law to grant tenure and an arbitrator has no power or authority to make a decision requiring the commission of an act which is prohibited by this statute. The case of Central School District No. 1 of Towns of Carmel and Putnam Valley, Putnam County, New York (Mahopac Central School District) v. Mahopac Teachers Association (1972) 72 Misc 2d 503, 339 N.Y.S. 2d 790 has ruled that the power to grant tenure to teachers is vested exclusively in the Board of Education and that the question whether tenure should be granted a teacher is not an arbitrable issue.

Also see, In the Matter of the Arbitration between Central School District No. 3 of the Town of Cortlandt, petitioner, and Central School District No. 3 Faculty Association et al., 75 Misc 2d 521.

This court also finds that no grievance is presented by the respondent, Mary E. Taylor, arbitrable under the terms of the agreement dated November 1, 1971, made pursuant to the Taylor Law and entered into between the respondent Auburn Teachers Association and the petitioner, Board of Education. There is no arbitrable dispute present between the petitioner and the respondents that arose out of the provisions contained in this agreement.

It is the finding of this court that the petitioner Board of Education in denying tenure to the respondent, Mary E. Taylor, did so in compliance with all of the statutory requirements provided in the Education Law of the State of New York and tenure under the law of the State of New York is not arbitrable.

Pursuant to Section 7503(b) Civil Practice Law and Rules and for the reasons above stated, a judgment is granted staying the arbitration between Auburn Teachers Association and the Board of Education of the Enlarged City School District of the City of Auburn, New York and all proceedings therein.

Submit judgment accordingly.

Dated: January 4, 1974

Justice Supreme Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD M. KINSELLA,

Plaintiff

-vs- CIVIL 1973-187

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT No. 7 OF THE TOWNS OF AMHERST AND TONAWANDA, ERIE COUNTY and EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants

Before OAKES, Circuit Judge, HENDERSON, Chief District Judge, and CURTIN, District Judge.

APPEARANCES: BERNARD F. ASHE, ESQ. and JAMES R. SANDNER, ESQ., Albany, New York, for Plaintiff.

OHLIN, DAMON, MOREY, SAWYER & MOOT (JAMES S. McASKILL, ESQ., of Counsel), Buffalo, New York; THOMAS L. DAVID, ESQ., Buffalo, New York, for Defendant Central School District No. 7.

LOUIS J. LEFKOWITZ, ESQ., Attorney General of the State of New York (DOUGLAS S. CREAM, ESQ., Assistant Attorney General, of Counsel), for Defendant Nyquist.

HENDERSON, Chief District Judge:

The plaintiff in this action is a tenured school teacher who has been employed by the defendant school board as a physical education and health education instructor for the past fourteen years. On March 1, 1973 the principal of the Senior High School of Sweet Home Central School District, where plaintiff is employed, filed charges against plaintiff

with the defendant school board pursuant to provisions of section 3020-a-1 of the Education Law of the State of New York. Those charges allege that on three separate occasions the plaintiff administered excessive corporal punishment to high school students. On March 5, 1973 the school board, acting pursuant to the same statute, made a finding that probable cause existed to support the charges. Plaintiff was notified in writing of the charges and of his right to a hearing before a three-member panel. Plaintiff requested that such a hearing be held, but prior thereto he filed this action, praying for a judgment declaring sections 3012 and 3020-a of the Education Law unconstitutional. Since plaintiff further seeks a permanent injunction against the operation of the above statutes, a three-judge panel was convened to hear argument.

Plaintiff's challenge to the constitutionality of section 3012 is based upon a claim of vagueness and overbreadth. With respect to section 3020-a plaintiff contends that the procedures set forth therein for the removal of a tenured teacher constitute a deprivation of property without due process, a violation of the equal protection clause, and potential infringement of a teacher's First Amendment rights. The court finds the equal protection and First Amendment claims to be improperly raised in this litigation.[1] The plaintiff's remaining contentions will be discussed in turn, together with the question of this court's abstention, which was raised initially at oral argument.

ABSTENTION

In a proper case for abstention, the uncertainty in state law must be such that construction of the statute by a state court might obviate the need for decision of a federal constitutional question. Railroad Commission v. Pullman Co., 312 U.S. 496 (1941); Zwickler v. Koota, 389 U.S. 241, 248-49 (1967).

The Supreme Court has repeatedly emphasized that abstention should not be ordered merely to give the state courts the first opportunity to decide constitutional issues. It has also cautioned that abstention frequently leads to piecemeal adjudication in many courts, which will cause an undue delay of the ultimate decision on the merits. Baggett v. Bullitt, 377 U.S. 360, 378-79 (1964).

With these guidelines in mind, we conclude that the instant case is not an appropriate one for abstention. The facts of this case do not raise questions of ambiguity in the state statute which the state courts might resolve in a way that would end the constitutional controversy. Wisconsin v. Constantineau, 400 U.S. 433, at 439 (1971). Nor is this a case where principles of comity would require abstention in the face of a pending state court proceeding. Lake Carriers Association v. MacMullan, 406 U.S. 498 at 509 (1972).

VAGUENESS AND OVERBREADTH

Section 3012 of the Education Law provides:

"2. . . . Such persons, [teachers appointed to tenure] and all others employed in the

> teaching service of the schools of such union free school district, who have served the probationary period as provided in this section, shall hold their respective positions during good behavior and efficient and competent service, and shall not be removed except for any of the following causes, after a hearing, as provided by section three thousand twenty-a of such law: (a) insubordination, immoral character or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty; (c) failure to maintain certification as required by this chapter and by the regulations of the commissioner of education. . . ." (Emphasis added.)

Plaintiff contends that the underscored language is both unconstitutionally vague and overbroad in that it fails to set forth guidelines for its application, either in other statutes or in the rules or regulations of either defendant, citing Connally v. General Construction Co., 269 U.S. 385 (1926). We find this contention without merit. Whatever may be the outer limits of the statutory language in question, that uncertainty has little relevance where the conduct alleged falls squarely within the hard core of conduct the statute was designed to proscribe. Broadrick v. State of Oklahoma, 41 U.S.L.W 5111 (U.S. June 25, 1973). The charges filed against the plaintiff in this case constitute conduct which, if proven, would fall squarely within the statutory language set forth above.

DUE PROCESS

Section 3020-a of the Education Law provides the administrative machinery for processing charges against a tenured teacher.[2] Such charges must be filed in writing with

the clerk of the employing school district. Within five days of the date the school board is notified of the charges, the board, meeting in executive session, determines by majority vote whether probable cause exists to support the charges. If a probable cause finding is made, a written statement of the charges is sent to the teacher. The teacher may then elect to have a hearing before a three-member panel selected from a list maintained by the Commissioner of Education, and presided over by a hearing officer selected by the commissioner. At such a hearing the rules of evidence do not apply, but the teacher may be represented by counsel, may testify in his own behalf, and may subpoena and cross-examine witnesses. A verbatim record of the hearing is kept, transcribed and furnished to the teacher without charge. Following the hearing, the panel forwards its report and the transcripts of the proceedings to the commissioner. The Commissioner of Education then forwards to the employing board a hearing report setting forth the findings and recommendations of the hearing panel, including any recommendation as to penalty. The statute states that within thirty days of receipt of the hearing report, the employing board "shall determine the case by a vote of a majority of all members of such board and fix a penalty or punishment, if any . . ."

The plaintiff contends that the procedures set forth in section 3020-a constitute a denial of due process in that (1) a teacher is denied a meaningful hearing of his case because he is not permitted to present favorable evidence or to

rebut adverse evidence before the body that has the power to decide the case, that is, the school board; (2) the same attorney who represents the school board at the time of the probable cause finding will act as "prosecuting attorney" before the hearing panel in his capacity as attorney for the school principal who brought the charges, and will continue to act as attorney for the school board and presumably render advice to that board, at the time the case is finally determined; (3) the same body that makes the finding that probable cause exists to support the charge filed against a teacher will ultimately make the final decision of guilt or non-guilt and will decide upon a penalty; (4) a teacher may be suspended from his duties prior to any hearing.[3]

Any consideration of the procedures required by the due process clause, under a given set of circumstances, must begin with the question of whether the plaintiff may be deprived of "liberty" or "property" within the meaning of the due process clause as a result of those procedures. Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 895 (1961).

In two recent decisions, Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972), the Supreme Court provided guidance as to which interests of government employees are constitutionally protected. Taken together, those cases establish that a tenured teacher has a property interest in continued employment in the absence of "sufficient cause" for dismissal. Perry v. Sindermann, supra at 601-03.

Since we are faced with a possible deprivation of a protected property interest, the ultimate question to be decided is whether the procedures mandated by section 3020-a comply with the requirements of due process.[4]

The crux of the plaintiff's due process claim is a challenge to the procedures involved in the final determination of the employing board which follows the hearing panel stage of the proceedings. The plaintiff contends that while section 3020-a provides for a hearing that conforms to due process standards, the right to a hearing is illusory because nothing that occurs before the hearing panel need have any impact on the school board's final determination.

Section 3020-a has been construed to mean that the findings and recommendations of the hearing panel are merely advisory and not in any way conclusive upon the employing board. LeTarte v. Board of Education, 65 Misc. 2d 147, 316 N.Y.S. 2d 781 (1970). The statute does not require that the school Board's decision be based upon the record developed before the hearing panel. Indeed, there is no requirement that a transcript of the hearing panel proceedings even be sent to the school board, although it has been represented at oral argument that the school board may, if it so desires, order the transcript. While the school board does receive a hearing report which contains the findings and recommendations of the panel, that report does not contain even a summary of the evidence elicited at the hearing.

Not only does the procedure outlined above fail to insure that the school board's decision will be based on evidence elicited at the hearing, it provides no safeguard against the school board's basing that decision on ex parte evidence. Furthermore, the problem is exacerbated by the fact that the school board is not required to render a written decision setting forth its reasoning and the factual basis for its decision. The situation is analogous to that faced by the Supreme Court in Goldberg v. Kelly, 397 U.S. 254 (1970) involving the termination of welfare benefits. The standards set forth in that decision are applicable here:

> "[T]he decisionmaker's conclusion . . . must rest solely on the legal rules and on evidence adduced at the hearing. (Citations omitted.) To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on. . . ." (Citations omitted.) Id. at 271.

In support of the constitutionality of the statute, the defendants contend that section 3020-a-5 affords the teacher the opportunity to appeal to New York Supreme Court in a special proceeding brought under Article 78 of the New York Civil Practice Law and Rules. The defendants contend that this provision would require the state court to review the school board's decision in light of the facts elicited at the hearing before the hearing panel.

This court finds that an appeal under Article 78 of the New York CPLR cannot correct the constitutional defects of section 3020-a. Since the school board is not required to

set forth reasons in support of its decision, a review of the factual determination relied upon by the board becomes illusory. Simply stated, there will not be an adequate record for a state court to review. See, United States v. Merz, 376 U.S.192 (1964).

The remaining contentions of the plaintiff need not detain us. The plaintiff sees a due process violation in the multiple roles played by both the school board itself and the board's attorney who also represents the school principal before the hearing panel. The affidavit of the school board attorney makes it clear that he never intended to counsel the school board as to its determination in the event this case proceeded to that point. Moreover, the Supreme Court has indicated the performing of multiple functions by individuals or groups in administrative processes is not per se a due process violation. Richardson v. Perales, 402 U.S. 389, 410 (1971). See also, Marcello v. Bonds, 349 U.S. 302 (1965).

For the foregoing reasons we declare that § 302-a [sic] of the Education Law of the State of New York, absent administrative regulations requiring decision to be based upon evidence elicited before the hearing panel and the decision of the Board to set forth the reasons and factual basis therefor, is unconstitutional, and the defendants are enjoined from its enforcement until such time as appropriate administrative or legislative action is taken to remedy the defects in the procedures here involved.

It is so ordered.

/s/ James L. Oakes
U.S.C.J.

/s/ John O. Henderson
U.S.D.J.

/s/ John T. Curtin
U.S.D.J.

DATED: February 19, 1974

FOOTNOTES

1

Plaintiff's status as a tenured teacher does not give him standing to raise the argument that, since the procedures of section 3020-a are available only to tenured teachers, the statute discriminates against non-tenured teachers. His claim that section 3020-a could be used to chill the First Amendment rights of teachers is without merit, since the undisputed facts of this case raise no question of an infringement of First Amendment rights.

2

§ 3020-a. Hearing procedures and penalties.

1. Filing of charges. Except in cities having a population of one million or more, all charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three of this law, no charges under this section shall be brought more than five years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. Disposition of charges. Upon receipt of the charges, the clerk of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof. Within five days of receipt of the statement of charges, the employee shall notify the clerk of the employing board whether he desired a hearing on the charges. Unless the employee has waived his right to a hearing within the allotted time, the clerk of the board shall, not later than the end of said five-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within fifteen days, by a

vote of a majority of all the members of such board, to determine the case and fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.

3. Hearings.

a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the local school district, or county seat, within twenty working days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.

b. Hearing panel members. For the purposes of this section the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, professional personnel with administrative or supervisory responsibility, chief school administrators, members of employing boards and others, selected from lists of nominees submitted by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members shall be compensated at the rate of fifty dollars for each day of actual service plus necessary travel and subsistence expenses incurred in carrying out the duties of a panel member.

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three members not resident, nor employed, in the territory under the jurisdiction of the employing board, selected in the following manner from the list maintained by the commissioner of

education for such purposes: one member shall be selected by the employee, one member shall be selected by the employing board and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the commissioner of education.

Each such hearing shall be conducted by a hearing officer designated by the commissioner of education and shall be public or private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself and an opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the hearing officer in charge is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee involved.

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty if one is warranted, to the employee and to the clerk of the employing board. Within thirty days of receipt of such hearing report the employing board shall determine the case by a vote of a majority of all the members of such board and fix the penalty or punishment, if any, which shall consist of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

5. Appeal. Any employee feeling himself aggrieved may review the determination of the employing board either by appeal to the commissioner of education as provided for by article seven of this chapter, or by a special proceeding under article seventy-eight of the civil practice law and rules. If the employee elects to institute such proceeding, the determination of the employing board shall be deemed to be final for the purpose of such proceeding.

3 While we need not reach the question of suspension here since the plaintiff has not in fact been suspended, we note the rather surprising recent decision in Jerry v. Board of Education, 347 N.Y.S.2d 917 (Sup. Ct. 1973), permitting suspension of a tenured teacher without pay on the basis of charges that, if proved, would warrant dismissal.

4 We note that the Supreme Court has recently, 42 U.S.L.W. 3281 (U.S. Nov. 18, 1973), heard argument in Kennedy v. Sanchez, 349 F. Supp. 863 (N.D. Ill. 1972), prob. juris. noted sub. nom. Phillips v. Kennedy, 411 U.S. 915 (1973), a case in which a three-judge court held certain portions of the Lloyd-Lafollette Act, 5 U.S.C. §7501, relating to discharge procedures applicable to federal competitive service employees, to be unconstitutional. Since the provisions of § 3020-a resemble, in some respects, those of 5 U.S.C. § 7501, our decision here will have to be applied with deference to the Court's decision when handed down.

No 8795

The University of the State of New York

The State Education Department

Before the Commissioner

IN THE MATTER

of the

Appeal of THOMAS L. FITZGERALD from action of the Board of Education of the Mexico Central School District, with regard to the dismissal of a substitute teacher.

Seidenberg & Strunk, Esqs.....attorneys for petitioner
Faith A. Seidenberg, of counsel

Mowry & Mowry, Esqs.....attorneys for respondent
John B. Mowry, Esq., of counsel

During the fall term of the 1971-72 school year, petitioner was employed by respondent board as a substitute teacher of science and health at the Mexico Academy and Central School. Petitioner was assigned to teach Health 7 and Science 7, the "7" designating the seventh grade, which normally includes students between the ages of 11 and 13.

Petitioner's health course included several areas, one of which was human sexuality. During that phase of the course, petitioner issued an assignment of homework to his students consisting of using a dictionary to ascertain the meaning of certain words used in a supplement to the teaching text. The parents of

several students objected strenuously to this assignment and demanded the immediate dismissal of petitioner. In response, respondent board held a special meeting on December 13, 1971. After the conclusion of the meeting, petitioner was informed by the district principal that respondent board had adopted a resolution ordering his immediate dismissal.

Petitioner then commenced an action against the principal of Mexico Academy and Central School and respondent board in the United States District Court for the Northern District of New York. In a decision dated March 16, 1973, the Court dismissed the complaint against the principal for failure of proof and against respondent board for lack of jurisdiction. The Court's decision with regard to the action against respondent board was that it could not entertain this action since respondent board was not deemed to be a person within the meaning of section 1983 of Title 42 of the United States Code. The Court further pointed out that petitioner had available to him the remedy of an appeal under section 310 of the Education Law, but had not elected to utilize that remedy.

Petitioner now brings this appeal under section 310 of the Education Law, asking that I direct respondent to expunge any reference to petitioner's dismissal from its records. Petitioner also asks that I order respondent to indemnify petitioner for both actual losses suffered and for damages due to pain and suffering.

Petitioner has alleged that his rights were violated by the manner in which respondent board conducted its special meeting of December 13, 1971. He has alleged that he should have been allowed to be present during all deliberations of respondent board, including those had in executive session. The meeting held by respondent was not in the nature of a tenure hearing where petitioner would be entitled to be present. A board of education may meet in executive session to discuss any matter within its jurisdiction (Matter of Everhart, 8 Ed. Dept. Rep. 171). Respondent was under no obligation to admit petitioner to such a session (Education Law, section 1708 subdivision 3). There is also no time limit on the length of an executive session other than that imposed by good judgment and the reasonable exercise of discretion (Matter of Kramer, 72 St. Dept. 114).

The main thrust of petitioner's argument is that respondent's action dismissing him without notice or a hearing constituted a denial of due process. As the United States Court of Appeals for the Second Circuit stated in Canty v. Board of Education of the City of New York, 470 F 2d 111:

> "The mere subjective expectancy of tenure did not entitle appellant to the full scale due process hearing to which a government employee is entitled when his employments falls within the Fourteenth Amendment's protection of liberty and property. See Perry v. Sinderman, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)."

Since petitioner was never appointed to a probationary term but was merely appointed as a substitute for the fall term of the school year in question, it is obvious that he could not have even a "subjective expectancy of tenure" and he therefore was not entitled to a due process hearing. In addition, it should be noted that petitioner suffered no financial harm since the record shows that he was fully compensated for the entire term for which he had been engaged as a substitute.

For the foregoing reasons, the appeal must be dismissed.

THE APPEAL IS DISMISSED.

IN WITNESS WHEREOF, I, Ewald B. Nyquist, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 7th day of March, 1974

Commissioner of Education

[Matter of Little, Unpublished Opinion;
Caption Omitted by the Court.]

OPINION OF THE COURT

SUPREME COURT, NASSAU COUNTY — SPECIAL TERM PART I

BY LYNDE J.

(SAME TITLE)

DATED NOV 1 1972

Index #11527/72
Cal. #51 (10/12/72

RICHARD L. BALTIMORE, JR., ESQ.
Attorney for Petitioner
299 Broadway
New York, New York 10007

GILBERT HENOCH, ESQ.
Attorney for Respondent
320 Fulton Avenue
Hempstead, New York 11550

In this proceeding pursuant to Article 78 of the CPLR, judgment is granted in favor of petitioner to the extent of declaring that petitioner's services with the respondent board have not been terminated.

No evidence has been presented to indicate that written notice was given to petitioner by respondent in compliance with Education Law Section 3019-a prior to July 1, 1972 or at any time. Since July 1, 1972, a probationary teacher's services cannot be terminated without compliance with the procedures set forth in Education Law Section 3031. (Chapter 866 of the laws of 1972) Until respondent shall have complied with that Section, petitioner remains employed by the district.

Settle judgment on notice.

/s/ E.R. Lynde
J.S.C.

APPENDIX "E"

UNITED STATES

Constitution

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

United States Code

Title 28

§1331. Federal question; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of

interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

§1343. Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statutue, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Title 42

§1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

NEW YORK

Education Law

§310. Appeals or petitions to commissioner of education and other proceedings.

Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

§3013. Tenure: certain other school districts.

1. (a) Teachers and all other members of the teaching staff, of school districts employing eight or more teachers, other than city school districts and school districts having a population of four thousand five hundred or more and employing a superintendent of schools, shall be appointed by a majority vote of the board of education or trustees upon recommendation of the district superintendent of schools from lists submitted to such district superintendent by the principal of the district in which they are to be employed for a probationary period of five years. Services of a person so appointed to any such positions may be discontinued at any time during such probationary period, upon the recommendation of the district superintendent, by a majority vote of the board of education or trustees.

* * *

2. On or before the expiration of the probationary term of a person appointed for such term, the district superintendent of schools shall make a written report to

the board of education or trustees recommending for the district, those persons who have been found competent, efficient and satisfactory. By a majority vote the board of education or trustees may then appoint on tenure any or all of the persons recommended by the district superintendent of schools. Such persons shall hold their respective positions during good behavior and competent and efficient service and shall not be removed except for any of the following causes, after a hearing, as provided by section three thousand twenty-a of such law: (a) Insubordination, immoral character or conduct unbecoming a teacher; (b) Inefficiency, incompetency, physical or mental disability or neglect of duty; (c) Failure to maintain certification as required by this chapter and by the regulations of the commissioner of education. Each person who is not to be so recommended for appointment on tenure shall be so notified in writing by the district superintendent not later than sixty days immediately preceding the expiration of his probationary period.

3. Notwithstanding any other provisions of this section no period in any school year for which there is no required service and/or for which no compensation is provided shall in any event constitute a break or suspension of probationary period or continuity of tenure rights of any of the persons hereinabove described.

§3019-a. Notice of termination of service by teachers.

A teacher who desires to terminate his services to a school district at any time, shall file a written notice thereof with the school authorities of such school district or with the board of cooperative educational services or county vocational education and extension board at least thirty days prior to the date of such termination of services. School authorities or such boards which desire to terminate the services of a teacher during the probationary period shall give a written notice thereof to such teacher at least thirty days prior to the effective date of such termination of services.

§3031. Procedure when tenure not to be granted at conclusion of probationary period or when services to be discontinued.

Notwithstanding any other provision of this chapter and except in cities having a population of one million or more, boards of education and boards of cooperative educational services shall review all recommendations not to appoint a person on tenure, and, teachers employed on probation by any school district or by any board of cooperative educational services, as to whom a recommendation is to be made that appointment on tenure not be granted or that their services be discontinued shall, at least thirty days prior to the board meeting at which such recommendation is to be considered, be notified of such intended recommendation and the date of

the board meeting at which it is to be considered. Such teacher may, not later than twenty-one days prior to such meeting, request in writing that he be furnished with a written statement giving the reasons of such recommendation and within seven days thereafter such written statement shall be furnished. Such teacher may file a written response to such statement with the district clerk not later than seven days prior to the date of the board meeting.

This section shall not be construed as modifying existing law with respect to the rights of probationary teachers or the powers and duties of boards of education or boards of cooperative educational services, with respect to the discontinuance of services of teachers or appointments on tenure of teachers.

Code of Rules and Regulations - Title 8, Department of Education

§275.16 Limitation of time for initiation of appeal.

An appeal to the commissioner must be instituted within 30 days from the making of the decision or the performance of the act complained of. The commissioner, in his sole discretion, may excuse a failure to commence an appeal within the time specified for good cause shown. The reasons for such failure shall be set forth in the petition.

§276.2 Oral argument.

(a) If a petitioner desires an opportunity for oral argument before the commissioner, a request therefor must be clearly set forth in the petition. If no such request is made, the respondent, or if there be more than one, a respondent may request oral argument at any time prior to or with the service of an answer. If a petitioner has failed to request oral argument but respondent has made a timely request, petitioner may, within two weeks from receipt of respondent's request, request oral argument on his own behalf.

(b) The commissioner may, in his sole discretion, determine whether oral argument shall be had.

(c) Argument on appeals to the commissioner may be heard before the commissioner, the acting commissioner or the counsel.

(d) All evidentiary material shall be presented by affidavit or by exhibits. No testimony is taken and no transcript of oral argument will be made.

(e) Adjournment of the date of oral argument. Once an appeal has been scheduled for oral argument on a particular date by the office of counsel and due notification has been given to the respective parties or their attorneys, no adjournments of that date will be granted by the commissioner unless timely application is made therefor, upon notice to all parties. Such application shall be in writing, addressed to the office of counsel, must be postmarked not later than five days prior to the date on which oral argument is scheduled to be heard, and shall set forth in full the reasons for the request.

(f) The maximum time allotted for oral argument will be 20 minutes for each party except in extraordinary cases where, upon application, the commissioner extends such time.

IN THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

FRANCIS C. PLANO, Appellant, -against- CLIFFORD W. BAKER, Individually and as Supervising Principal of Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK B. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District , Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, Appellees.	Docket No. 74-1527 AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
)ss.:
COUNTY OF ALBANY)

RUBY P. NICHOLSON, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 81 Academy Road, Albany, New York, 12208. That on the 3rd day of June, 1974 deponent served the within Brief and Appendix upon Evans, Severn, Bankert & Peet, Attorneys for Appellees (Baker, Melie, Acee, Barns, Nowak, Plehn, Richards, Romeo & Walker), 301 Mayro Building, Utica, New York 13501; Michael P.

DeSantis, Attorney for the Appellee Board of Education of the Westmoreland Central School District, 709-10 First National Bank Building, Utica, New York 13501; and, John C. Scholl, Attorney for Appellee, F. Wright Johnson, Individually and Officially, 408 Leonard Place, Utica, New York 13502, by depositing same, certified mail, return receipt requested, in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Ruby P. Nicholson

SWORN TO BEFORE me this

3rd day of June, 1974.

Notary Public

PATRICIA A. COLITSAS
Notary Public in the State of New York
Residing in Albany County
My Commission Expires March 30, 19 76